Selection of Leading Cases

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HINDU LAW

Supplementary Cases

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SELECTION OF LEADING CASES.

I.

HINDU LAW.

RAM GOPAL BHATTACHARJEE,

v.

NARAIN CHANDRA BANDOPADHYA.*

[*Reported in I.L.R. 33 Calc. 315; 3 C.L.J. 15; 10 C.W.N. 510.*]

1905
December, 6.

SECOND APPEAL by the defendant No. 1, Ram Gopal Bhattacharjee.

The plaintiff, Narain Chandra Bandopadhya, instituted this suit, out of which the second appeal arose, on the following allegations: That the defendant No. 1 on the 2nd January 1898 granted a *mourasi* and *mokarari* lease of the property in suit to his daughter Prabhabati, on whose death her husband Baidyanath as her sole heir became entitled to and remained in possession of the property. That on the 16th May 1901 Baidyanath let out the property to the plaintiff in *mourasi mokarari* right on receipt of a premium of Rs. 300 and put him in possession. The plaintiff alleged that he had been dispossessed by the defendant No. 1 and he accordingly instituted this suit for recovery of possession.

The defendant No. 1, who alone defended the suit, pleaded *inter alia* that the lease to Prabhabati was not a real transaction and that the property belonged to him; he also pleaded that, even if the lease was a genuine transaction, the property was Prabhabati's *stridhana* after marriage and that her mother was her heir and not Baidyanath.

The Munsif, who tried the suit, found the lease to be a real and *bona fide* transaction; he held that the property was Prabhabati's *stridhana* obtained after marriage to which the mother was

*PRESENT.—The Hon'ble Mr. JUSTICE RAMPINI and Mr. JUSTICE MOOKERJEE.

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entitled to succeed before the husband. He accordingly held that the plaintiff had acquired no title under the lease granted by the husband and he dismissed the suit.

On appeal by the plaintiff, the Subordinate Judge affirmed the finding that the lease granted to Prabhabati was a real transaction. He found also that the lease had been granted to Prabhabati after her marriage; that she did not pay any consideration; that the lease merely reserved a quit rent of one rupee a year; that Prabhabati died childless leaving her husband and that her mother was still alive. He held, however, that in respect of the property in suit the husband was the preferential heir and he accordingly decreed the suit.

The defendant No. 1 appealed to the High Court.

The following judgment was delivered:

RAMPINI AND MOOKERJEE JJ. The facts which have given rise to the litigation out of which this appeal arises, so far as it is necessary to state them for the decision of the questions of law raised before us, are practically undisputed. The property which is the subject matter of this litigation originally belonged to the appellant. On the 2nd January 1898 he granted a *mourasi* and *mokarari* lease of this property, reserving an annual rent of one rupee, to his daughter Pravabati. Pravabati died in 1901 and on the 16th May 1901, the plaintiff took a sub-lease of the lands comprised in the tenancy from her husband, and on the basis of this sub-lease, the plaintiff seeks to recover possession. The appellant, who was the first defendant in the Court below, resisted the claim on the ground that as Pravabati died childless leaving her mother as her heiress according to Hindu Law, her husband had no title to the property and could not confer any on the plaintiff. The Courts below have concurrently held that the interest created by the appellant in favour of his daughter constituted her *stridhan*, but while the Court of the first instance held that the mother was entitled to succeed in preference to the husband, the learned Subordinate Judge has held that the husband was entitled to succeed in preference to the mother. The substantial questions of law, therefore, which arise in this appeal and which have been elaborately discussed at the Bar, are *first*, whether the property in dispute was *stridhan* as understood

in the Bengal School of Hindu Law, and, *secondly*, whether the husband or the mother is the preferential heir to it.

As regards the first question we do not entertain any doubt that the property in dispute has the characteristics of *stridhan* as defined in the Dayabhaga. It was indeed contended by the learned vakil for the respondent that a leasehold interest was unknown in the times when the authoritative text-books on Hindu Law were written, and that consequently the interest in property, which was created by the appellant in favour of his daughter, was not property to which the rules laid down in the text-books on Hindu Law could have any possible application. In our opinion there is no force in this contention. In the first place no authority has been cited in support of the proposition that leasehold interests were unknown at the time when the Dayabhaga was written. In the second place, we are not prepared to hold that the rules of Hindu Law are so inelastic as to be capable of application only to such descriptions of interests in property as formed the subject matter of transactions at the time when the rules were first formulated. Indeed if the rules of Hindu Law were so narrowly construed and applied it would be impossible to administer them, because in any case, the Courts would be called upon to hold a preliminary enquiry as to when a particular rule was first laid down and also as to what kinds of interest in property were recognized at that time. In the third place, if leasehold interest was not recognized as property, it is difficult to see how the plaintiff could have acquired any right on the basis of which his claim could be sustained. We must therefore hold that the property in suit is one to which the rules of Hindu Law are applicable. We are further of opinion that it possesses the characteristics of *stridhan*—according to the Dayabhaga in Chap. IV, sec. 1, paras. 18 and 19 of which it is laid down that, "that alone is her peculiar property which she has power to give, sell or use independently of her husband's control; Katyayana expresses this rather concisely. The wealth which is earned by mechanical arts or which is received through affection from any other (but the kindred) is always subject to his (husband's) dominion. The rest is pronounced to be the woman's property." No doubt this definition may be open to the objection that it defines one unknown quantity by means of

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another. But it is clear from the text of Katyayana referred to as is also from the text of Kavyayana quoted in the Dayabhaga Chap. XI, sec. 1, para. 56 that under the Bengal School of Hindu Law, a female has not absolute power of disposition over (i) what she earns by the mechanical arts, (ii) what is given to her by strangers at any time other than that of marriage and (iii) what she inherits from a male or a female relation. The property in suit does not come under any of these categories, and must be taken to be one which Kavobati had power to give, sell or use independently of her husband's control. It was therefore *stridhan* within the meaning of that term as used in the Dayabhaga. We think it is also clear that it comes within the description of *yautaka stridhan* as it was given to her by her father after her marriage. Further it comes within the class known as *anwadheya*, which is thus defined in the Dayabhaga in paras. 15 and 16, of Chap IV, sec. 3.—"15. For anything received by her subsequently to her nuptials is comprehended under the denomination of *anwadheya* (gift subsequent). "16. Katyayana describes *anwadheya* (a gift subsequent) what has been received by a woman from the family of her husband and at a time posterior to her marriage, is called a gift subsequent and so is that which is similarly received from the family of her kindred."

With reference to these passages, it was argued by the learned vakil for the respondent that nothing is *anwadheya* which is not given as a "gift" and as in the case before us the appellant created in favour of his daughter a leasehold interest, and that interest is not comprised within the class of *anwadheya*. We are unable to accept this contention as sound. As is shown by the definitions we have referred to, what is received is called *anwadheya*, which is also the derivative meaning of the term, and the phrase "gift subsequent" which has been adopted as the English equivalent of *anwadheya* cannot be allowed to restrict its meaning. Looking to the substance of the transaction in the case before us, the appellant parted with all his interest in the property in favour of his daughter, reserving the right to receive a nominal sum annually. It is conceded that if such right had not been reserved and the transaction had been called a gift, the property acquired by the daughter would have been comprehended in the term *anwadheya*. We are unable to hold

that the reservation of a nominal rent altered the character of the transaction so far as the question now before us is concerned. There cannot be any reasonable doubt that the daughter received from the father a substantial interest in the property, although it was not the entire interest, which the father was competent to transfer. We hold accordingly upon the first question raised before us that the interest, in the property transferred to Pravabati under the deed of the 2nd January 1898, constituted her *agantuka stridhan* and falls within the class known as *anwadheya*.

As regards the *second* question raised before us, namely, whether the husband or the mother was the preferential heir to the property in suit upon the death of Pravabati, the answer must depend upon the interpretation of certain passages, in the Dayabhaga. But before we refer to these passages, it is desirable to point out that for the purposes of inheritance Jimutavahana divides *stridhan* property into two broad classes, namely, *agantuka* or property given to a female at a time other than that of marriage and *yautuka* or property given to a female at the time of marriage. The rules laid down for these two classes which are mutually exclusive are subject to modifications in the cases of (*a*) maiden's property and (*b*) *pitridatta* or property given by the father, for which special rules are laid down. It is clear from Chap. IV, secs. 2 and 3 that general rules are first laid down for *agantuka stridhan* and then follow special rules for *yautuka stridhan*. This is quite clear from the Dayabhaga, Chap. IV, sec. 2, paras. 1—6 which contain the general rules laid down by Jimutavahana relating to the devolution of the *stridhan* of a female, who leaves issue. Then follows special rules relating to *yautuka stridhan* in Chap. IV, sec. 2, paras. 13 and 16. If now we refer to sec. 3, which deals with succession to the *stridhan* property of a childless woman, we find it laid down in para. 29 that "the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but on failure of these it devolves on the husband. Thus Katyayana says, that which has been given to her by her kindred goes on failure of kindred to her husband." This passage in our opinion contains the rule laid down by Jimutavahana regarding the order of succession to the *agantuka stridhan* of a childless woman. No doubt, the passage comes immediately after a discussion upon the

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question of the right of inheritance to the kind of *stridhan* called *sulka* or gratuity, but we do not think that the passage can be restricted in its application to that kind of *stridhan* alone. In support of this view we may refer to the decision of this Court in the case of *Judoo Nath Sircar* v. *Bussunt Coomar*,[1] where Mr. Justice Dwarka Nath Mitter, after an elaborate examination of the different paragraphs of sec. 3, Chap. IV of the Dayabhaga, pointed out that the proposition laid down in para. 29 is nothing but the final *resume* of the various matters discussed in the preceding paragraphs commencing from paragraph 10, which makes the brother a preferential heir to the husband in respect of wealth received by a woman after her marriage from the family of the father of her mother or of her husband; indeed the applicability of para. 29 to all the three kinds of *stridhan* mentioned in the text of Yagnavalka cited in para. 10 is beyond all dispute. We entirely agree with the line of reasoning adopted by that learned Judge with regard to the scope of the rule laid down in para. 29 and we are fortified in this view by the opinion of three of the commentators on the Dayabhaga, namely, Srinath, Rambhadra and Srikrishna, who expressly state that the rule enunciated in para. 29 is a summary of the preceding discussion. [See the Edition of the Dayabhaga with six commentaries published by Prosanno Coomar Tagore in 1863, pp. 173, 174.] We may further point out that the conclusion at which Jimutavahana arrived is clearly supported by the text of Manu (Chap. IX, 196-197) cited in the Dayabhaga, Chap. IV, sec. 2, para. 27, by the text of Yagnavalka (Chap. II, 143-145) referred to by implication in the same passage, by the text of Katyayana quoted in the Dayabhaga, Chap. IV, sec. 3, para. 12, and by the text of Baudhayana set out in the Dayabhaga, Chap. IV, sec. 3, para. 7. These texts lay down that in certain specified cases, the husband or the parents succeed first, and the inference is irresistible that in other cases, by the general rule, the brother succeeds first. It is argued, however, by the learned vakil for the respondent that the rule by which the husband is postponed to the brother, mother and father in the case of succession to the *apratika stridhan* of childless females, applies only to the property of a female married in one of the

[1] 1 (1873) 19 W. R. 201 (P. C.).

inferior or disapproved forms, and in support of this proposition reliance is placed upon Srikrishna's Dayakrama Sangraha, Chap. II, sec. 4, para. 11, which provides as follows :—

"Failing either of these (that is barren and widowed daughters), the other succeeds, and, in defaults of successors including the barren and widowed daughters, the succession devolves in due order, by the rule of analogy, as in the case of wealth received at nuptials, namely, on the woman's husband, brother, mother and father, if she were married according to any one of the five forms denominated Brahma and the rest ; or if she were married according to any of the three forms styled Asura, &c., on her mother, father, brother and husband."

Reference is also made to the summary given by Srikrishna at the end of his commentary Chap. IV, sec. 3 of the Dayabhaga, where the same view is enunciated. This opinion of Srikrishna, however, though apparently founded upon the first interpretation of the text of Manu quoted in the Dayabhaga, Chap. IV, sec. 2, para. 16, is directly contrary to that of Jimutavahana as expounded in Chap. IV, section 3, paras. 12 and 13 of the Dayabhaga, which is to this effect—

"12. That is confirmed by Vridha Katyayana, who says immovable property which has been given by parents to their daughter, goes *always* to her brother, if she dies without issue. For it appears that the brother's right of succession is founded simply on her leaving no issue (which is the case equally of a maiden, as of a childless wife).

"13. The remark of Viswarupa that property of a childless woman married by any form of nuptials from that of Brahma to that of the Pissachas (as hinted by the term *always*) goes to her brother, should, therefore, be respected."

In other words, the text of Devala, namely, that "a woman's property is common to her sons and unmarried daughters, when she is dead ; but if she leave no issue, her husband shall take it, her mother, her brother, or her father," which is quoted by Jimutavahana in the Dayabhaga, Chap. IV, sec. 2, para. 6, is regarded by him as enumerating the heirs, and not as indicating the order in which they are entitled to succeed. The question, therefore, ultimately resolves into this, whose opinion is to

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prevail, whether that of Jimutavahana or that of his commentator Srikrishna; and we have no hesitation in holding that we must accept the view propounded by Jimutavahana. We hold accordingly that as the property in this case was *agantuka stridhan*, the mother would be entitled to succeed in preference to the husband subject to the decision of the question with which we shall presently deal.

It is contended in the next place that as the property in dispute in this case was not merely *agantuka stridhan*, but *stridhan* received from the father, the husband is entitled to succeed in preference to the mother. In support of this proposition reference is made to the Dayabhaga, Chap. IV, sec. 2, para. 16, and to the Dayakrama Sangraha, Chap. II, sec. 5, para. 3. In the passage of the Dayabhaga, relied upon, Jimutavahana first quotes the text of Manu (Chap. IX—198), namely, "the wealth of a woman which has been in any manner given to her by her father, let the Brahmini damsel take, or let it belong to her offspring," and then comments on it as follows:—"since the text specifies 'given by her father', the meaning must be that property which was given to her by her father, even at any other time besides that of nuptials, shall belong exclusively to her daughter, and the term Brahmini is merely illustrative, indicating that a daughter of the same tribe with the giver inherits." No doubt this passage is an authority for the proposition that an unmarried daughter alone inherits the *pitridatta stridhan* whether it is *gautaka* or *agantuka*. But as we understand the passage, it throws no light upon the question of the devolution of the property, when there is no unmarried daughter. The only inference legitimately deducible from this passage appears to be that according to Jimutavahana, subject to the one variation mentioned in this passage, *gautuka* given by the father is inherited as other *gautuka*, and *agantuka* given by the father is inherited as other *agantuka*. As regards the passage of the Dayakrama Sangraha relied upon, it occurs in sec. 5, which treats of the succession to the *stridhan* of a woman when given to her by her father and runs as follows:—

"1. In regard to the wealth given by a father to a woman at the time of the wedding or antecedent or subsequent to it, a maiden daughter inherits in the first place.

"2. After her, a married daughter who has, and one who is likely to have, male issue, inherit together.

"3. Next the succession devolves on the barren and widowed daughters, and, in default of all daughters, the son and the rest succeed, as *in the case of property received at nuptials*. For a text of Manu declares, the wealth of a woman which has been in any manner given to her by her father, let the Brahmini damsel take or let it belong to her offspring.

"4. Here by the specification of 'given by the father,' it is intended, that whatever has been given by the father even at any other time than that of the wedding, belongs first to the damsel, and after her it goes to her offspring, her son."

The first paragraph of this passage refers explicitly to *yautuka* as also to *ayautuka stridhan*. The second and third paragraphs may at first sight be supposed to have an equally extensive application, but in our opinion, the words "as in the case of property received at nuptials" clearly indicate that the list of heirs given by the author in paras. 2 and 3 is applicable only to *pitridatta yautuka*. This view is considerably strengthened by a reference to the summary given by Srikrishna in the concluding portion of his commentary on Chap. IV, sec. 3 of the Dayabhaga. He states there in unmistakable terms that as regards *pitridatta ayautuka*, that is, property given by the father at any other time but the wedding, a maiden daughter succeeds in the first instance; next a son; then a daughter who has, and one who is likely to have male issue; after them, the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, and her grandson and great-grandson in the male line, next to these, the barren and widowed daughters inherit together. If, therefore, paragraphs 2 and 3 of Srikrishna's Dayakrama Sangraha, Chap. II, sec. 5, be interpreted as applicable to *yautuka* as well as *ayautuka stridhan*, the conclusion is irresistible that his view as set forth in his treatise is absolutely irreconcileable with his view as summarised in the commentary on the Dayabhaga. On the other hand, according to the interpretation put by us on paragraphs 2 and 3 of the Dayakrama Sangraha, Chap. II, sec. 5 by which the rule laid down therein is restricted in its application to *pitridatta yautuka stridhan*, the views indicated in the two places become

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substantially identical, the only points of difference being that in the passage in the Dayakrama Sangraha, no distinction is observed between a maiden daughter and a betrothed one, and no provision is expressly made for the exclusive succession of one member of each of the two groups of different classes of daughters in the absence of the other members. We must, therefore, hold that the statement contained in the second paragraph is equivalent to the proposition that after the maiden daughter, a married daughter who has and one who is likely to have male issue inherit together the *pitridatta yautuk* or the property given by the father at the time of the nuptials. Thus interpreted the passage lends no support to the contention advanced on behalf of the respondent; but it makes it consistent with paragraph 4 which refers clearly to *pitridatta ayautuka*, and we may add that it removes the difficulty which Mr. Justice Dwarka Nath Mitter found in dealing with this passage in the case of *Jadoo Nath Sircar* v. *Bussunt Coomar Roy Chowdhry* [1]. We must hold accordingly that neither according to Jimutavahana nor according to Srikrishna, does the fact that *stridhan* is *pitridatta* make any difference in deciding the question of preference between the mother and the husband. As we have already held that the mother is the preferential heir, according to Jimutavahana, in the case of *ayautuka stridhan*, the conclusion follows that under the Bengal School of Hindu Law, the mother is entitled to succeed to the *pitridatta ayautuka stridhan* of a woman in preference to her husband. This is also in accordance with the view propounded by Raghunandan in his Dayatatwa; see the translation by Sastri Golap Chandra Sircar, Chap. X, para. 11, which justifies the inference that to a property, other than a nuptial gift, given by a father to his daughter, the successive heirs, after the step-son's son, are her brother, mother, father, and husband.

We may point out that the conclusion at which we have arrived upon an examination of the original authorities, is supported by the cases of *Jadoo Nath Sircar* v. *Bussunt Coomar Roy* [1], *Hurgyanbin Shaha* v. *Shunatun Saha* [2] and *Gopal Chandra*

[1] (1873) 19 W. R. 284; 11 B. L. R. 284.
[2] (1876) I. L. R. 2 Calc. 275.

Pal v. *Ram Chandra Pramanik*.[1] The first of these cases was originally heard by Norman C. J. and Loch J.[2], and the learned Judges held adopting the construction put by Srikrishna on the original texts, that according to the Bengal School of Hindu Law, the husband is entitled to succeed to the property, which a woman receives from her father either before or after her marriage, in preference to her brother or mother. Upon an application for review this judgment was subsequently set aside[3] and the case was re-argued before Mr. Justice Jackson and Mr. Justice Dwarka Nath Mitter.[3] Mr. Justice Mitter, with the concurrence of Mr. Justice Jackson, held upon an elaborate examination of the authorities, that according to the Hindu Law as current in Bengal, the mother succeeds to the property of her daughter bequeathed to her by her father before her marriage in preference to her husband, and that such property falls within the category of *stridhan*. Although the process of reasoning by which that learned Judge arrived at this conclusion may be partially open to criticism, and although we are unable to adopt the construction placed by him upon the passage of the Dayakrama Sangraha, quoted from Chap. II, sec. 5, we entertain no doubt that the rule laid down by him is correct. The decision was followed in *Hurry Mohun Shaha* v. *Shonatun Saha*,[4] where it was held upon a construction of Chap. IV, sec. 3, para. 10 of the Dayabhaga, that with respect to property given to a woman after her marriage by her husband's father's sister's son, the brother, mother, and father, are under the Bengal School of Hindu Law preferable heirs to the husband; and in the recent case of *Gopal Chandra Pal* v. *Ramchandra*[1], the principle which underlies the decision in *Judoo Nath Sircar* v. *Bussunt Coomar Roy*[3] was accepted as well founded, and it was ruled that the brother is the preferential heir to the husband to movable property obtained from her father after her marriage, by a woman, who has died childless.

Reference was made at the bar, in the course of the argument, to two modern text-books in support of the view taken by the learned Subordinate Judge in the Court below, namely, to Mayne's

[1] (1901) I. L. R. 28 Calc. 311.
[2] (1871) 16 W. R. 105.
[3] (1873) 19 W. R. 264; 11 B. L. R. 286.
[4] (1876) I. L. R. 1 Cal. 275.

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Hindu Law, sec. 670 and Shama Charan Sarkar's Vyavastha Darpana, 2nd Ed., Vyavastha 478, p. 724. The first of these passages from Mr. Mayne's book does not help the respondent, because it refers to *yautuka stridhan*, as is clearly shown by a reference to sections 669 and 672; on the other hand, the statements contained in sections 673 and 674, which refer to the point under examination, are in agreement with the conclusion at which we have arrived. As to the second passage, which occurs in Shama Charan Sarkar's Vyavastha Darpana (2nd Ed., p. 722; 3rd Edition, p. 249) the author seems to adopt the rule laid down by Srikrishna in preference to that enunciated by Jimutavahana: but if we turn the table of order of succession given at p. 733 (3rd Ed., p. 262) we find, that as regards *stridhan* property of a childless married woman, bestowed upon her by her parents after marriage, the mother is stated to be a preferential heir to the husband, as is indicated by the authorities cited on pp. 719 and 720 of the same work (3rd Edition, pp. 246, 247). It follows consequently that the view taken by the Subordinate Judge cannot be successfully maintained.

The result therefore is that this appeal must be allowed and the decree of the Subordinate Judge reversed. The suit will stand dismissed with costs in all the Courts.

Appeal allowed.

Note.—What a female can dispose of at her pleasure is her *stridhan*. Every kind of *stridhan* is not alienable by her at her pleasure. Thus under the Bengal School of Hindu Law, a female has not absolute power of disposition over (1) what she earns by mechanical arts, (2) what is given to her by strangers at any time other than that of marriage and (3) what she inherits from a male or a female relation. Hence property obtained by compromise (*Sandamini v. Administrator General*, I. L. R. 20 Calc., 433 P. C., L. R. 20 I. A. 12; *Sambasiva v. Venkatasami*, I. L. R. 31 Mad. 179, Wallis J. dissenting), property obtained by adverse possession (during coverture and widowhood, *Mohim v. Kashi*, 2 C. W. N. 161 at p. 162—the same is also the rule under the Mitakshara School of Hindu Law), property purchased by a woman with her *stridhan* and the savings of the income of *stridhan* (*Subramania v. Arunachelam*, I. L. R. 28 Mad. 1 P. C.), property acquired by will (*Gadibeyina v. Dabbakuti*, 28 M. L. J. 495; the case is under the Mitakshara School of Hindu Law) constitute her *stridhan*.

An interest in the property can be the subject of *Ayautaka* [illegible] *stridhan*. The rules of Hindu Law are applicable to interest in property as did not form the subject matter of transactions at the time when the rules were so formulated. A property bequeathed to a daughter was held to be

her *stridhan*. See *Jadoonath* v. *Bussunt*, 11 B. L. R. 286; 19 W. R. 264. Power of appointment given in a Hindu Will, if exercised in favour of persons existing at the testator's death, is valid. *Bai Motivahai* v. *Mamubai*, I. L. R. 21 Bom. 789 P. C.

The succession to such property given to a woman after her marriage by her father, in case of her dying childless is (1) brother, (2) mother, (3) father and (4) husband. The opinion of Jimutavahana is to be preferred to that of Srikrishna. A brother is preferred to husband (*Mohendra* v. *Giris*, 19 C. W. N. 1287) and a younger brother of the husband to the step-brother of the deceased. *Debi* v. *Harendra*, 12 C. L. J. 385; I. L. R. 37 Calc. 863. In case she leaves issue, a son succeeds in preference to married daughter *Prosanna* v. *Sarat*, 8 C. L. J. 200; I. L. R. 36 Calc. 86. (The word *Kanya* in all Schools means *unmarried daughter*; see *Tara* v. *Krishna*, I. L. R. 31 Bom. 495 at p. 503 foot-note.)

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HIRALAL SINGHA
v.
TRIPURA CHARAN RAY.

[Reported in I.L.R. 40 Calc. 650 F.B.; 17 C.L.J. 438 F.B.; 17 C.W.N. 679 F.B.]

This is a second appeal which arises as follows: The suit is for rent for a house at Rs. 15 a month from September, 1905 to August, 1908, to which the plaintiff claims to be entitled under a *Kabala*, dated the 20th July, 1908, executed in his favour by Haracband Jalal, which transferred to him not only the house but also rents in arrear from the defendant in respect of it. He is therefore suing for Rs. 630 in arrears and Rs. 15 that has accrued due since his purchase. Haracband purported to execute the *Kabala* as being entitled to eight annas of the property conveyed by purchase, and to the other eight annas by inheritance from his aunt Dayamoyee Dasee who originally bought the property with him. The findings of fact in the Court below show that Haracband had a good title to the eight annas share, that Hiralal Singha, the appellant, was tenant of Haracband and Dayamoyee—this is in effect found as a matter of fact though it is treated as a matter of estoppel—and that the *Kabala* set up by the plaintiff is a binding document. It is an admitted fact that Dayamoyee was a prostitute, and that it is found that Haracband is the son of her brother and heir to Dayamoyee, except in so far as he may be prevented from being so by the fact that Dayamoyee was a prostitute. The plaintiff is a pleader of the Howrah Court.

The judgment of the Court (JENKINS C.J., HARRINGTON, STEPHEN, MOOKERJEE AND HOLMWOOD JJ.) was delivered by

MOOKERJEE J. This is an appeal by the first defendant in a suit for house rent. To appreciate the question of law which calls for decision, it is necessary to state briefly the undisputed facts. The house originally belonged to Kanailal Ghosh, who transferred it on the 10th October, 1895, to Dayamoyee Dasee and her brother's son Hara Chand Jalal. The purchasers, while in possession of the house, leased it to the first defendant on the 1st January, 1901. Shortly after, Dayamoyee Dasee died, on the 25th February, 1901. On the 20th July, 1908, Hara Chand Jalal transferred the house to the plaintiff, on the allegation that, upon the death of his father's sister, Dayamoyee Dasee, he had taken by inheritance her half share of the property and had thus become full owner thereof. On the 8th September, 1908, the plaintiff commenced the present suit for rent. Besides other defences, not material at this stage, the

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first defendant resisted the claim on the plea that Dayamoyee Dasee was a prostitute, and that consequently, Hara Chand Jalal, though her brother's son, was not her heir under the Hindu Law. This contention has been overruled by both the Courts below. The evidence shows that Dayamoyee Dasee was a married woman, that after the death of her husband she became a prostitute, and that she was the mistress of one Bose. The house was apparently purchased by her own earnings, and, throughout this litigation, it has been assumed that it was her *stridhan* property. This assumption is in accord with the accepted view of the Bengal School of Hindu Law, namely, that the term *stridhan* has no technical meaning or, in the words of Jimutavahana, "that alone is *stridhan* which she has power to give sale or use, independently of her husband's control." Dayabhaga, Chapter IV, Section I, paragraph 18 : *Brij Indar Bahadur Singh* v. *Rance Janki Koer*. [1] The substantial question of law which, consequently, here requires examination may be formulated in these terms :

"Does the *stridhan* property of a Hindu woman who has adopted the life of a prostitute pass upon death to her brother's son as an heir under the Bengal School of Hindu Law ?"

It cannot be disputed that if a Hindu woman, governed by the Bengal School, is respectable, her *stridhan* property passes upon her death to her brother's son, in the absence of nearer heirs. This position is established by Jimutavahana in the Dayabhaga (Chapter IV, Section III, paragraph 37). Having pointed out in paragraphs 35 and 36 that the text of Vrihaspati mentioned in parapraph 31 relates merely to the right of succession, and is not declaratory of the order of inheritance, he observes that the text is "expressive of the strength of the fact (of the benefits conferred)" and then proceeds to develop the order of succession in paragraph 37 in the following terms :

"This then is the order of succession according to the various degrees of benefit to the owner of the property from the oblation of food at obsequies. In the first place, the husband's younger brother is entitled to the woman's property ; for he is a *sapinda*, and presents oblations to her, to her husband and

[1] (1877) L. R. 5 I. A. 1 ; 1 C. L. R. 313.

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to three persons to whom oblations were to be offered by her husband. After him the son either of her husband's elder or of his younger brother, is heir to the separate property of his uncle's wife, for he is a *sapinda* and presents oblations to her husband and to two persons to whom oblations were to be offered by her husband. On failure of such, the sister's son, though he is not a *sapinda*, inherits the separate property left by his mother's sister, because he presents oblations to her and to three persons (her father and the rest) to whom oblations would have been offered by her son. In default of him, the son of her husband's sister (for it is reasonable, since the husband has a weaker claim than the son, that persons claiming under them should have similar relative precedence) is heir to the property of his uncle's wife, because he presents oblations to three persons to whom they were to be offered by her husband, and also presents oblations to her and to her husband. *On failure of him, the brother's son is the successor to his aunt's property, for he presents oblations to the father, to her grandfather, and to herself.* If there be no nephew, the husband of her daughter is heir to his mother-in-law's property, since he presents oblations to his mother-in-law and father-in-law."

The language used in this passage does not restrict it application to the *stridhan* property of a respectable woman only: the language is comprehensive enough to include *stridhan* property of a prostitute, who does not by the mere fact of lapse into prostitution cease to be a Hindu or to be subject to the rules of Hindu Law. (Mitakshara on Yajnavalka II, 135, Sethu's edition, page 1105; Girish Chandra Tarkabhakar's Translation, page 121). The question therefore arises whether the rule laid down in the Dayabhaga, Chapter IV, Section III, paragraph 37, should be held inapplicable to the case of succession to the *stridhan* property of a prostitute, either because the reason on which the rule is founded ceases to be applicable in the case of a prostitute, or because, upon general principles of Hindu jurisprudence, the rule should be restricted to its application only to *stridhan* property of a respectable woman. In so far as the reason for the rule is concerned, Jimutavahana states that the brother's son is the successor to his aunt's property because he presents oblations to the father, to her

grandfather and to herself. It is plain that the capacity to present oblations to the father and the grandfather of the aunt is not dependent upon her character ; the claimant offers such oblations because they are the father and the grandfather of his own father. In so far, therefore, as capacity to present oblations to the father and the grandfather of the woman is concerned, the claimant possesses that qualification, whether or not his aunt is respectable. But in so far as capacity to present oblations to herself is concerned, it may be argued that when she lapses into prostitution the claimant loses that capacity. This, in fact, is the line of argument adopted by the appellant as based upon general principles of Hindu jurisprudence. The contention in essence is that when a Hindu woman lapses into prostitution, she is civilly dead, and that in the eye of the law the tie which connected her to any person through her father, mother, husband or children is completely severed ; in other words, so far as her relations are concerned, the position is precisely the same as if she had suffered physical death. To establish this position, the appellant has been constrained to argue that when a woman lapses into prositution she becomes an outcast, and that when a person has become an outcast, whether a man or a woman, the kinsmen must perform the same ceremonies as at the time of death.

Reference has been made to the following passages from the laws of Manu :

"The *sapindas* and *samanodakas* of an outcast must offer a libation of water to him, *as if he were dead*, outside the village, on an inauspicious day in the evening, and in the presence of the relatives, officiating priests and teachers" (XI, 183).

"A female slave shall upset with her foot a pot filled with water, *as if it were for a dead person* ; his *sapindas* as well as the *samanodakas* shall be impure for a day and a night" (XI, 184).

"But thenceforward, it shall be forbidden to converse with him, to sit with him, to give him a share of the inheritance, and to hold with him such intercourse as is usual among men" (XI, 185).

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"And, if he be the eldest, his right of primogeniture shall be withheld, and the additional share due to the eldest son; and in his stead a younger brother excelling in virtue shall obtain the share of the eldest" (XI, 186). ("Sacred Books of East," Volume 25, page 468).

Before we determine the true import of this passage, we may observe that passages similar in scope and character are to be found in other institutional writers, amongst whom may be mentioned Gautama (XX, 4—7, S. B. E., Volume 2, page 278), Vasistha (XV, 12—16, S. B. E., Volume 14, page 77), Baudhayana (II, 1, 36, S. B. E., Volume 14, page 216) and Yajnavalkya (III, 295, Mandlik, 270). In each of these instances as in the case of the laws of Manu, the passages are followed by rules for the performance of penance, which serve to throw light upon the true significance of the directions for excommunication of outcasts. Thus we have in the laws of Manu:

"But when he has performed his penance, they shall bathe with him in a holy pool and throw down a new pot, filled with water" (XI, 187).

"But he shall throw that pot into water, enter his house and perform, as before, all the duties incumbent on a relative" (XI, 188).

Of the like import are passages in Gautama (XX, 10—14, S. B. E., Volume 2, page 279), Vasistha (XV, 17—21, S. B. E., Volume 14, page 77), Baudhayana (II, 1, 36, S. B. E., Volume 14, page 216) and Yajnavalkya (III, 296, Mandlik, page 270). Of equal significance is the following passage from the laws of Manu, which refers specially to female outcasts:

"Let him follow the same rule in the case of female outcasts, but clothes, food and drink shall be given to them and they shall live close to the family house" (XI, 189, S. B. E., Volume 25, page 469).

Upon this passage, three of the commentators of Manu, namely, Medhatithi, Sarbajna Narayan and Govindaraj, observe that provision is necessary for the residence and subsistence even of fallen women, so that they may have no temptation to proceed further in the paths of vice (Manu, edited by Mandlik, page 1439 and page 157, Appendix).

To the same effect is the following passage from the Institutes of Yajnavalkya :

"This very ceremony is ordained in the case of degraded women. They should be given dwelling room in the vicinity of the house, provided with food and clothing, and be guarded" (III, 297, Mandlik, page 270).

Vijnaneswara comments upon this passage that the fallen women should be allowed food just sufficient to sustain life and a piece of soiled cloth ; he adds that she should be reproved and admonished not to have intercourse with another man (Mitakshara Ed. by Setlur, page 1382). To the same effect is the comment of Apararka (Poona edition, page 1208).

It is fairly clear from the passages already quoted that the performance of ceremonies, similar to obsequial ceremonies, by the kindred of a person who is guilty of a heinous sin and has thereby become an outcast, is indicative not of the fact that he is civilly dead but rather of the fact that his social rights have been suspended and such rights may be revived by the performance of the appropriate ceremonies and penances. This is supported by the express statement of Apararka in his Commentary on Yajnavalkya (III, 294, Poona Edition, page 1205), that the outcast is, from the time of the performance of the ceremonies described, to be excluded from all social and religious performances and no one is to have intercourse with him in ordinary life. Apararka supports this view by quotations from the Institutes of Gautama, Vasishta, Sankha and Likhita. This is further confirmed by the fact that the social rights of the outcast may be revived upon the performance of the prescribed penances and ceremonies. This is elaborated in the Prayaschitta Viveka of Sulapani, in which heinous sins which cause degradation are divided into nine classes. For sins of each class penances, ceremonies and gifts are prescribed, and these vary in respect of different sins even in the same class, according to their gravity. A convenient summary of the different classes of sins and of the respective penances and ceremonies will be found in the Sabdakalpadruma, Art. *Prayaschitta*, Volume 3, pages 321—364. The view that an outcast is not civilly dead is further supported by the fact that the kindred of an outcast have to perform his obsequial

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ceremonies after his death. Thus, in the Chaturbarga Chintamani of Hemadri (Asiatic Society's edition, *Pariseskhanda*, Volume III, page 1661), it is stated that the obsequial ceremonies of an outcast, or of a person who has killed a cow or a Brahmin, are to be performed after the lapse of one year from his death. To the same effect is a passage in the Agnipurana, in which it is stated that salvation is effected of a person who has killed a Brahmin or a cow, or who has committed five heinous sins or who is guilty of ingratitude, if funeral oblations are offered for the benefit of such person at Gaya (Sabdakalpadruma, Volume III, page 24, Art. *Patita*). In fact, Chapter XXII of the Pariseskhanda of the Chaturbarga Chintamani of Hemadri (Asiatic Society's edition, Volume III, page 1657) shows conclusively that obsequial ceremonies of an outcast should be performed by his kindred for the purpose of his salvation. To the same effect is the statement in the Institutes of Vishnu (XXII, 57, S. B. E., Volume 7, page 93). "On the death day of an outcast, a female slave of his must upset a pot with water with her feet, saying, 'drink thou this.'" In fact there is no foundation for the position suggested by the appellant, namely, that when a person becomes an outcast he is in the contemplation of Hindu law, civilly dead for all purposes, and that the tie of relationship which connected him with his kindred is completely severed. The rites which are directed to be performed by his kindred when he becomes an outcast are intended to emphasise the complete exclusion of the outcast from all social and religious performances. This view is not opposed to that adopted by Raghunandan in the passage from his Institutes (Volume I, page 544) where he differentiates between the two-fold property of a heinous sin, namely, first, its capacity to cause the sinner to go to hell, and, secondly, its capacity to cause exclusion from social intercourse; the former effect cannot be avoided when the sinful act is intentionally committed, but the second can be removed by the performance of penance and the sinner restored thereafter to social intercourse. Raghunandan does not hold that a person guilty of a heinous sin thereby cancels the tie of kindred which binds him to his relations. Stress, however, was laid upon a passage of the Dayabhaga (1, 31) in which Jimutavahana observes that sons have not a right of ownership in the wealth of the living parents, but in

the estates of both when deceased, and adds that this means "not mere demise, but also the state of a person degraded, gone into retirement, or the like." This passage, however, is clearly of no assistance to the appellant, because it merely asserts that right of property is annulled by degradation. That this is the true import of the passage is clear from the Dayatattwa of Raghunandan (Chapter I, paragraphs 9—11) where he points out with reference to the text of Narada quoted by Jimutavahana in the Dayabhaga (1, 32) and expounded in (1, 33), that sons are entitled to partition if the right of property of the parent be annulled by death or by degradation. This oviously refers to an entirely different problem. We are not now concerned with the question, whether a person who has committed a heinous sin and has become an outcast may not only be excluded from inheritance (Dayabhaga, Chapter V, paragraphs 6—13), but may also lose all rights of property, or whether such a comprehensive proposition can be reconciled with the view accepted by their Lordships of the Judicial Committee in the case of *Mouiram Kolita* v. *Keri Kolitani* [1]; nor need we determine whether the decision in *Sheonauth Rai* v. *Mussumaut Dayamyee Chowdrain*, [2] upon which much stress was laid by the appellant, can be treated as well founded on principle, in so far as it ruled that an adopted son forfeits his rights in the estate of his adoptive father by reason of intercourse with a Mahomedan woman, subjecting him to the penalty of irrevocable expulsion from caste. The question now under consideration is of an entirely different character; we are called upon to determine whether, where a woman lapses into prostitution, the tie of her relationship with her kindred is severed so as to render it impossible for the kindred to claim her estate by inheritance. As already stated, the texts do not support the theory that the tie is so severed. No doubt, there is the opinion of Mr. J. C. C. Sutherland, in his Synopsis of the Hindu law of Adoption appended to his translation of the Dattaka Mimansa and Dattaka Chandrika, to the effect that the mother of an infant may give him in adoption even during the lifetime of her husband who has permanently emigrated, entered a religious order or become an outcast,

[1] (1880) I. L. R. 5 Calc. 776; L. R. 7 I. A. 115.

[2] (1814) 2 Mac. Sel. Rep. 137; 6 I. D. (O. S.) 462.

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because, being civilly dead, he would be regarded as virtually deceased. No authority, however, is mentioned in support of this proposition, in so far as an outcast is concerned; on the other hand, the passages in the Dattaka Mimansa (Section IV, paragraphs 9 and 10) and Dattaka Chandrika (Section I, paragraphs 7, 31, 32) mentioned, refer to cases where the husband has disappeared or has entered a religious order. But, even if there were any authority for the extension of the rule to a case where the husband has become an outcast, it might be defended possibly on the theory that the father, by his expulsion from caste, had been deprived of that right of guardianship over his child which alone would entitle him to assent to the adoption of the infant into a different family. In any event, Mr. Sutherland does not support his theory of civil death of an outcast by reference to any authorities, and it is significant that, in the preface to his work, he candidly admits that the synopsis possesses no intrinsic authority whatsoever, and that of the propositions it contains many are dubious and some may prove erroneous. We take it therefore, that the appellant has failed to establish the theory that when a woman lapses into postitution, the tie of relationship which connects her with her kindred is thereby dissolved, so as to make it impossible for the kindred to claim her *stridhan* property by inheritance by reason of the relationship in which they stand to her. It is obvious that the adoption of such a theory would have rendered it necessary for the Hindu lawgivers and commentators to provide a set of rules regulating succession to the property of a woman who has adopted the life of a prostitute. That prostitutes existed and were recognised in ancient Hindu society is clear from the passage of the Mitakshara to which reference has already been made (Mitakshara, Sethur's edition, page 1105; Girish Chandra Tarkalankar's translation, page 121). It is extremely improbable that, if the theory suggested by the appellants were well founded, the doctrine would be left to be inferred from casual references, and no provision would be made to regulate succession to the estate of a woman who has lapsed into prostitution. On the other hand, it may be conceded that cases of this description would rarely find their way into Courts; respectable people would deem it a degradation to acknowledge relationship

with a fallen woman, much less would they be ready to claim property which represented the wages of her sin. It is remarkable that this feeling led Chanakya to lay down in his Arthasastra that the estate of women of this class taken by the King by escheat in the absence of heirs should be given away by him in charity (Arthasastra of Kautilya, Mysore edition, page 161); but Chanakya undoubtedly contemplated that the estate would not reach the hands of the King till there was a complete failure of heirs. The same idea pervades a passage in the Vatsyayan Sutra (Jaipur edition, page 347) where it is stated that the wealth of a fallen woman may be taken in gift by a Brahmin for religious purposes, if it does not reach his hands directly. But the position is entirely different when the kindred of a woman who has lapsed into prostitution lay claim to her estate upon her death. The mere fact of the degraded life she led did not sever the tie of relationship between her and her kindred, and though she might have been disqualified as an heiress, there is no reason why her undegraded relations should not, if they are prepared to put forward the claim, take her *stridhan* estate by right of inheritance.

It has been earnestly contended, however, on behalf of the appellant, that this view is directly opposed to what has been regarded as settled law in the Courts of this Province since 1846, and should on that ground alone be repudiated. We are clearly of opinion that this contention ought not to prevail. It is true that in the case of *Tara Munnee Dossee* v. *Motee Buneanee*,[1] it was held that the tie of relationship severed between a married and respectable daughter and her mother when the latter adopts the life of a prostitute. This decision was founded upon an opinion of the Pandit of the Sudder Court which is supported neither by any statement of reasons nor by any reference to the original texts. On the other hand, in the Matsya Purana, as quoted in the Sabdakalpadruma, Volume III, page 24, it is expressly stated that there may be fallen persons who cannot be forsaken and, as an illustration, it is said that although elder relations who may have lapsed into prostitution, or have otherwise fallen, should be abandoned, yet the mother should never be

[1] (1846) 7 Mac Sel. Rep. 325; 8 I. D. (O. S.) 247.

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so treated, and the reason assigned for this preferential treatment is that the mother who has borne and bred the child is the greatest of all relations. It is unfortunate that this decision of the Sudder Court, based on such doubtful authority, should have been subsequently accepted without question: *In the goods of Kasinayanney Beesh*,[1] *Saroshoyee Bewa* v. *Secretary of State*.[2] But the position was doubted in *Bhutnath Mondol* v. *Secretary of State*,[3] *Sundaree Dyanee* v. *Nemycharan Das*,[4] *Priyacharan Banerjee* v. *Hariwati Dasi*,[5] and in the referring order in the case of *Chatoo Kurmi* v. *Rajaram Tewari*.[6] It is clear, therefore, that the course of decisions in this Court on the point since 1846 has not been uniform: *Harilal Singha* v. *Rup Manjori Burmani*.[7] In the Madras High Court, the decision in *Tara Mannee Dossea* v. *Mofee Bancanee*[8] was followed in *Sivanuga* v. *Minal*,[9] which was accepted as good law in *Narasanna* v. *Ganga*.[10] But in the later case of *Sellayya Pillai* v. *Ramasami Pillai*,[11] the learned Judges of the Madras High Court expressly dissented from the proposition that degradation on account of unchastity entails, in the eye of the law, complete cessation of the tie of kindred between the fallen woman and the members of her natural family, or between her and the members of her husband's family, observing that, in their opinion, the circumstance that in general it is open to an outcast to resume his former position after expiation (Viramitrodaya, Chapter I, Section 32) strongly pointed to the view that degradation had the effect of rendering dormant at best the tie of kindred. (See Laws of Manu, XI, 60, 177-178, which prescribe the penance for the expiation of an adulterous woman; it is lighter or heavier according to the caste of the male offender: S. B. E., Volume 25, page 467; see also Vasistha, XXI, 8, 12—13, S. B. E., Volume 14, page 112; Vishnu, LIII, 8, S. B. E., Volume 7, page 174). The same view has been adopted by the Allahabad High Court in the cases *Bisheshar*

[1] (1894) I. L. R. 21 Calc. 697.
[2] (1897) I. L. R. 25 Calc. 254.
[3] (1906) 10 C. W. N. 1085.
[4] (1907) 6 C. L. J. 372.
[5] (1911) I. L. R. 38 Calc. 406.
[6] (1880) 11 C. L. J. 124.
[7] (1912) 17 C. L. J. 402.
[8] (1865) 7 Mad. Sel. Rep. 125.
[9] (1869) I. L. R. 12 Mad. 277.
[10] (1889) I. L. R. 13 Mad. 183.
[11] (1899) I. L. R. 23 Mad. 171.

v. *Mata Gholam*[1] and *Narain Das* v. *Tirlok Tiwari*.[2] In some of the cases, again, a question of competition between a degraded and an undegraded person has arisen for consideration, and this, in fact, was the real question before the Sudder Court in *Tara Munnee Dossea* v. *Motee Buneanee*[3]; so also was the question directly in issue in *Sivasanga* v. *Mina*[4], and *Narasanna* v. *Gangu*.[5] That question of preferential right does not require consideration in the case before us, and we need not consequently determine whether, as stated in *Subbaraya Pillai* v. *Ramasami Pillai*,[6] the claim of the degraded heir may be preferred to that of the undegraded heir of equal degree on any "equitable principle."

The extent to which divergence of judicial opinion is possible in cases of this description is well indicated by the decision in *Ramprasad* v. *Mt. Subu Bai*.[7] In that case, one Radha was legally married to one Mati Lal, but many years before her death she abandoned her husband, adopted the life of a prostitute and lived as the mistress of Raibhangi. Upon her death, her property, which had been received by her from her paramour, was claimed, on the one hand, by the daughter of her sister, and on the other, by a son of the brother of her husband. The claimants were both of them undegraded, but the defendant, the son of the husband's brother, resisted the claim of the plaintiff, the sister's daughter, on the ground that as a respectable woman she was not entitled to succeed by inheritance to the estate of her mother's sister, who had become degraded by reason of lifelong prostitution. The Judicial Commissioner declined to accept the contention that when a woman has lapsed into prostitution she becomes civilly dead, with the result that the tie of relationship which connects her to her kindred is completely severed. He held that no tie of blood can be destroyed by unchastity, whatever personal disability may be imposed by express provisions of the law upon the person who has become unchaste; consequently, where inheritance is a right arising out of consanguinity, the unchastity or degradation of the *propositus* or *proposita*, as the case may be, will not divert the descent of

[1] (1870) 2 All. H. C. R. 300.
[2] (1906) I. L. R. 29 All. 4.
[3] (1846) 7 Mac. Sel. Rep. 325; 8 I. D. (O. S.) 347.
[4] (1889) I. L. R. 12 Mad. 277.
[5] (1888) I. L. R. 13 Mad. 133.
[6] (1899) I. L. R. 23 Mad. 171.
[7] (1908) 4 Nag. L. R. 31.

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property, save where there is an express provision. In support of this view, reliance was placed upon *Mussumat Ganga Jati* v. *Ghasita*,[1] *Adeyapa* v. *Ramlinga*,[2] and *Kojiyada* v. *Lakshmi*,[3] and doubt was expressed as to the view adopted in *Ramnath Tolapattar* v. *Durga Sundari Debi*,[4] *Hanmanada* v. *Rai Kishori Baruani*[5] and *Sundari Letani* v. *Pitambari Letani*.[6] The learned Judge, however, proceeded to hold that prostitution on the part of the wife, during the lifetime of her husband, had operated to dissolve the marriage tie between them, and that they had ceased to be husband and wife, with the result that upon her death neither her husband nor any persons claiming through him could take by inheritance her *stridhan* property. This view, it will be observed, is founded upon the theory that kindredship by blood stand, in the matter of dissolubility, upon an entirely different footing from the tie of marriage, which, according to the learned Judge, is essentially and necessarily a contract though clothed with sacrament. The learned Judge very emphatically expressed the opinion that it would be anomalous to hold that a married woman who has lapsed into prostitution during the lifetime of her husband is still a wife, but that she has not a single conjugal right or claim attached to her wifehood, that her husband may think her as dead in respect of all rights given to her and all obligations imposed on him by the marriage, such as maintenance, protection, society, and inheritance from him, while he retains all his rights as a husband, including that of succession to her separate estate. From this point of view, it was not difficult to reach the conclusion that where a Brahmin husband totally and finally abandons his wife on the ground of unchastity, inexpiable or unexpiated, so as to destroy all her present and future claims on him and his inheritance, the relationship of marriage is dissolved, so far as it sustains the civil rights and obligations of husband and wife *inter se*. The same view was adopted in *Mahirani* v. *Thakur Prokash*,[7] where it was ruled that property acquired by an unchaste widow by prostitution cannot strictly be called her *stridhan* in

[1] (1878) I. L. R. 1 All. 46.
[2] (1879) I. L. R. 4 Bom. 104.
[3] (1881) I. L. R. 5 Mad. 140.
[4] (1898) I. L. R. 8 Calc. 410.
[5] (1894) I. L. R. 22 Calc. 947.
[6] (1895) I. L. R. 22 Calc. 971.
[7] (1911) 14 Oudh Cases 234.

the technical sense of a wife's or a married woman's property, and that property so acquired goes to her illegitimate child and not to the members of her husband's family, upon whom the widow had no claims whatever after she began to live with her paramour. It is not necessary, for our present purpose, to examine the question, by no means free from difficulty, as to the true nature of Hindu marriage, and the still more difficult question, whether the marriage tie is dissolved and the relationship of husband and wife annulled by the lapse of the wife into prostitution. Nor is it necessary to examine the futther question whether, assuming the marriage tie to be incapable of dissolution even by the reason of prostitution on the part of the wife, the sister's daughter or husband's brother's son would be the preferential heir to property acquired by her as a prostitute. The learned Judicial Commissioner held that no Hindu law-giver, with his high ideals of female chastity and of spiritual affinity between heir and *propositus*, would place the husband in the list of heirs to the acquisitions of his fallen wife by and during her degradation. In this view, the Judicial Commissioner held that the plaintiff, who was governed by the Bombay School of Hindu Law, was entitled to what was described in *Manilal Rewadat* v. *Bai Rewa*,[1] as *stridhan* "improper" of her mother's sister, on the ground that the defendant as the son of her husband's brother was either no heir at all, or if an heir was bound to be postponed to the plaintiff.

Upon an examination of the original texts and upon a review of the judicial decisions on the subject, we hold that the mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood, and, that consequently, the *stridhan* property of a Hindu woman who has adopted the life of a prostitute passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal School of Hindu Law.

It is conceded that, as held by the Division Bench, the plaintiff cannot successfully claim the arrears of rent purchased by him. The decree of the Court below must consequently be modified to this extent.

[1] (1892) I. L. R., 7 Bom. 758.

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In this view, the decree of the Subordinate Judge must be affirmed, subject to the variation mentioned. The respondent will have his costs of the hearing, as well before the Division Bench as before the Full Bench.

NOTE.—Prostitution does not sever the legal relation, and therefore the degradation of a woman in consequence of her unchasity does not in law entail a cessation of the tie of kindred between her and the members of her natural family or between her and the members of her husband's family. Succession to her property is governed by the Hindu Law; *Surnamoyee* v. *Secretary of State*, I. L. R., 25 Calc. 254. Nor does a wife's adultery, unattended by degradation, dissolve the marriage. Thus a mother is not debarred from inheriting her son's property on the ground of unchastity at the time at which she would otherwise inherit; *Kojiyada* v. *Lakshmi*, I. L. R. 5 Mad. 149. A husband succeeds to the property of his wife who left him and became a prostitute; *Narain Das* v. *Tirlok*, 3 A. L. J. R. 537; I. L. R. 29 All. 4. The unchastity is not a ground for excluding any female heir except a widow from inheritance. Thus a daughter is not excluded on the ground of unchastity from inheriting her mother's property; *Adrayapa* v. *Rudrava*, I. L. R. 4 Bom. 104; *Vedammal* v. *Vedanayaga* 18 M. L. J. 70 (74); I. L. R. 31 Mad. 100. The step-son of a degraded woman inherits the property as sapinda of her late husband in the absence of nearer heirs; *Subbaraya* v. *Ramasami*, I. L. R. 23 Mad. 171. Neither degradation nor aggravated unchastity (such as intercourse by a Hindu woman with a Mahomedan) affects the proprietary rights of the degraded or unchaste person; *Vedammal* v. *Vedanayaga*, 18 M. L. J. 70 (74); I. L. R. 31 Mad. 100.

Unchastity in a woman does not incapacitate her from inheriting stridhan of her female relative; *Ganga* v. *Ghasita*, I. L. R. 1 All. 46; *Nogendra* v. *Raja Benoy Krishna*, 7 C. W. N. 121; I. L. R. 30 Calc. 321. The sister's daughter, not being an heir according to the ordinary Hindu Law of the Bengal School, does not succeed to her deceased aunt's property, though she followed her in her degradation; *Sundari* v. *Hempe*, 6 C. L. J. 372. The absolute property of a Hindu prostitute is her stridhan for the purposes of succession. A legitimate son of a Sudra woman, born in lawful wedlock, succeeds to the property acquired by his mother by prostitution after the death of his father and the illegitimate daughter born in prostitution is not an heir to such property. The stain of degradation does not create a new heritable right in her; *Meenakshi* v. *Muniandi*, I. L. R. 38 Mad. 1144; 27 M. L. J. 353.

The case of a woman who is neither a married woman nor a maiden but a prostitute is one unprovided for in Mitakshara and in such a case, the Court may well have regard to the equitable considerations.

Degradation of the husband from caste does not dissolve the marriage tie; *Bisesher* v. *Mata Ghalam*, 2 All. H. C. R. 300.

An adoption does not sever the tie of blood in the natural family for all purposes. An adopted son has to observe mourning for the loss of his natural parents. He has to observe restrictions as to marriage with a girl from his natural family.

Before Jenkins C.J., Harington, Stephen, Mookerjee and Holmwood JJ.

DEVI PROSAD CHOWDHURY

v.

GOLAP BHAGAT.*

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April, 1.

This reference arose out of a suit for possession on establishment of title to certain lands. The appeal in the High Court was by the plaintiff.

The facts of the case, as stated in the referring order of Stephen J, are as follows :—

This suit was brought by the appellant to recover possession of certain mauzas as the heir of one Shib Nag Chandi, who became entitled to them after the death of Shib Nag's widow, Rani Radha Chowdhurani.

It was not disputed that the appellant was Shib Nag's heir, and the only question that had been argued was whether his claim was subject to a usufructuary mortgage executed by the widow in favour of defendent No. 2 on the 23rd Bhadra, 1293, to secure a loan of Rs. 7,000. It was contended by the defendant that this mortgage was valid as against the plaintiff because it was made for legal necessity, and because it was consented to by a man named Harbans Tewari, the son of a daughter of Shib Nag, who was at the time Shib Nag's heir and therefore entitled to mortgage property after the widow's death. The lower Court found both points in the defendant's favour and dismissed the suit.

The judgments of the Court are as follows :—

JENKINS C. J. The question submitted for the determination of this Full Bench is in these terms :

"Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband, without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner ?"

The husband in this case died without male issue and the widow became, and at the date of the alienation still was, his heir.

* Reference to a Full Bench in appeal from Original Decree No. 153 of 1908.

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A widow's power of alienation for purely worldly purposes over her sonless husband's estate has been a constant theme of discussion, and in some respects it has been placed beyond the possibility of further argument.

Thus it may be taken as settled beyond dispute that she can alienate for legal necessity either the whole or a part of her deceased husband's estate, and that even in the absence of such necessity the alienee's title will prevail if he made reasonable enquiry and acted in the honest belief that such necessity existed. But the problem how far apart from this she can alienate merely with the consent of her husband's kindred is beset with difficulty.

A multitude of authorities bearing on this point has been cited to us; and though I have considered them all I propose to refer only to a few in expressing my opinion on the question submitted for our determination.

In 1826 a Hindu widow's position was considered by the Privy Council, and Lord Gifford in delivering their Lordships' opinion said of her, "she is entitled to the possession of the property, but that she is only entitled to enjoy it according to the rights of a Hindu widow which it appears to me to be absolutely impossible to define—I mean the extent and limit of her power of disposing of it; because it must depend upon the circumstances of that disposition, whenever such disposition shall be made, and must be consistent with the law regulating such dispositions": *Govindchund Bysack* v. *Cossinaut Bysack*.[1]

In the *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[2] decided in 1861, it was said at page 551 of a Hindu widow that "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. . . . . The exception

[1] (1826) Montriou's H. L. C. 477; 1 I.D. (O.S.) 292, 309.

[2] (1861) 8 Moo. I. A. 529; 2 W. R. (P. C.) 61.

in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper."

The case of *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[1] came before the Privy Council in 1869 on appeal from the High Court at Fort William in Bengal. The transaction in controversy was a sale by a widow, the deed of conveyance being executed by her and attested by one Juggut Ram. The High Court held that the consent of Juggut Ram, unquestionably given at the time of the sale and against his own obvious interest, was a very strong piece of evidence in favour of the purchaser, as Juggut Ram was then the sole heir and reversioner, and, at the date of the sale, was the person most likely to know the real state of the case and the urgent necessities of the widow. In delivering the opinion of the Privy Council Sir James Colville, dealing with this question of consent, said: "Their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one, and one justified by Hindu Law. That it can be, as Mr. Field seemed to put it, a presumption of law in the sense of *praesumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

Their Lordships, after expressing their inability to affirm that Juggut had concurred in the deed, and their opinion that he was not proved to have been the next heir, then proceed as follows: "On the other hand, the very fact of his connection with the family leads to the presumption that he knew that the present appellant had the power given to her by her husband to adopt a child, and that, therefore, his interest, even if it existed, as next reversioner, was in all probability likely to be defeated. Therefore, if his concurrence were proved, it would

[1] (1869) 13 Moo. I. A. 209; 3 B. L. R. (P. C.) 57.

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not amount to such a concurrence by the husband's kindred as, in the opinion of their Lordships, would have defeated the plaintiff's claim." Then after pointing out that no issue as to concurrence had been raised in the pleadings or in earlier stages of the cause, they say: "The case of the party who sought to support the validity of this transaction was, that the sale had been made for particular purposes. He gave no evidence of that. He did not, by any suggestion in his written statement or otherwise, put forward the concurrence of Juggut Ram, either as supplying the want of proof of the existence of the debts and the necessity of the sale, or as a consent equivalent to such proof."

In *Sham Sundar Lal* v. *Achhan Kunwar*[1] Lord Davey, delivering their Lordships' opinion, says: "To give validity to the bonds . . . . the plaintiffs . . . . must show that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds, or either of them, and the circumstances are not such as, in the opinion of their Lordships to raise any presumption from such concurrence as there was of Achhan Kunwar and Inayet Singh in the first bond, or of Inayet Singh in the second bond that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing, and an intelligent intention to consent to such effect."

The law as enunciated by their Lordships in these cases is clear: the difficulty is occasioned by a decision of a Full Bench of this Court in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*,[2] where an answer in the affirmative was given to the question, "whether, according to the law current in Bengal, a transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer being assented to by the person

[1] (1898) I. L. R. 21 All. 71; L. R. 25 I. A. 183.
[2] (1884) I. L. R. 10 Calc. 1102.

who at the time is the next reversioner will conclude another person, not a party thereto, who is the actual reversioner upon the death of the widow from asserting this title to the property ?"

This decision rests on the theory of an acceleration of the next heirs' interest occasioned by the widow's relinquishment in his favour.

The reasoning in effect is this : it is only the widow's interest that stands in the way of the next heir's succession ; that obstacle is removed by the determination of the widow's interest : the determination can be effected by her death, civil or natural, by disclaimer at the husband's death, and so by relinquishment later.

In English law, it is true, a disclaimer by an heir will have no effect ; all he can do is to dispose of his inherited property by an ordinary conveyance, but *Nobokishore's* case [1] appears to lay down a different rule, at any rate for a Hindu widow.

But as there cannot be a disclaimer of a part, so the relinquishment must be of the whole, for it is only by a total relinquishment that the condition of the heirship can be determined : *Monzam Hassain Chowdhuri* v. *Bhonddin*. [2]

It was suggested by the respondent that in *Nobokishore's* case [1] the dealing was with a part of the property, and as supporting this, reliance was placed on the language of Banerjee J. in a later case. But there is nothing in the report of *Nobokishore's* case [1] that supports this view, and an examination of the original record in no way helps the respondent's contention. Moreover, it is opposed to the line of reasoning on which the decision rests. This view is in accord with the language of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*, [3] where it was said in appeal from Bengal : "It may be accepted that, according to Hindu law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances."

[1] (1884) I. L. R. 10 Calc. 1102.
[2] (1900) 5 C. W. N. 189.
[3] (1891) I. L. R. 19 Calc. 236 ; L. R. 19 I. A. 30.

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Starting then from the established position that the next heir's succession can be accelerated by relinquishment, it was determined in *Nobokishore's* case [1] as a logical consequence that the widow, with the next heir's consent, could alienate without any necessity.

But if logic is to have any place, the alienation so sanctioned must be of the entire estate. How far it can be said that the doctrine of acceleration consequent on relinquishment applies where the widow retains an interest in the purchased price, or the sale is little more than a change of investment, it is difficult to say; the cases do not refer to this. The road to the decision in *Nobokishore's* case [1] was not without its difficulties, but the learned Judges felt it had to be travelled that titles might be quieted. But it is settled that there should be no extension of this Bengal doctrine: *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*.[2]

Much reliance has been placed on this last decision of the Privy Council by the respondent in the argument before us, and Dr. Rashbehary has even contended that it is conclusive in his favour. There, by successive instruments, a widow purported to transfer for valuable consideration to her son-in-law the whole estate of her deceased husband whose heir she was. Subsequently the consent of the nearest reversionary heirs was obtained, but they predeceased the widow. This consent took the form of a relinquishment embodied in two deeds. The transaction was impugned by those who, at the widow's death, were the next heirs, and the question raised was whether the "deeds confirming the sales by the widow to Maheshar, executed by the then nearest reversioners, and disclaiming all title to the property in dispute, were binding on their descendants, the appellants, who were the nearest reversioners at the time when the succession opened, at the widow's death."[3] No new principle was formulated; that already established by prior decisions was applied to a novel set of facts.

The judgment, after stating that the principle is admitted, points out that the only question remaining for determination was the *quantum* of consent necessary. On this, the stricter

[1] (1884) I. L. R. 10 Calc. 1102.

[2] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

[3] (1907) I. L. R. 30 All. 1, 14.

doctrine of Allahabad was rejected in favour of the more tolerent view that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, though there might be cases in which special circumstances might render the strict enforcement of this rule impossible.

At the same time it was distinctly said that their Lordships would be unwilling to extend the widow's power of alienation beyond its present limit.

The result, then, of the authorities binding on us appears to me to be this. To uphold an alienation by a widow of her deceased husband's estate where she is his heir it should be shown—(i) that there was legal necessity, or (ii) that the alienee, after reasonable enquiry as to the necessity, acted honestly in the belief that it existed, or (iii) that there was such consent of the next heirs as would raise a presumption, either of the existence of necessity, or of reasonable inquiry and honest belief as to its existence, or (iv) that there was a consent of the next heirs to an alienation capable of being supported by reference to the theory of the relinquishment of the widow's entire interest and consequent acceleration of the interest of the consenting heirs. Where any one of the first three positions is established, the alienation may be of the whole or any part of the husband's estate; but where the fourth alone is proved, then the alienation must be of the whole.

Here the alienation is only of a part of the husband's estate, and that by way of mortgage, so that the fourth position cannot apply.

I would therefore answer the question propounded by saying that the alienation by way of mortgage by a Hindu widow as heiress of a portion of the estate of her deceased husband, without proof either of legal necessity or of reasonable enquiry, and honest belief as to its existence, but with consent of the next reversioner, for the time being, will be valid and binding on the actual reversioner if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof.

The case must be returned to the Division Bench for disposal in accordance with this answer to the reference.

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HARRINGTON J. The question in this reference is: "Is the alienation by way of mortgage by a Hindu window of a portion of the estate of her husband without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the next reversioner who is not the heir of the consenting reversioner?"

The question whether the widow can dispose of the whole of the estate of her deceased husband, with the consent of the next reversioner for the time being must be regarded as having been settled as far back as 1884 by a Full Bench of this Court, in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*.[1]

But, in that case, the decision does not appear to be based on any principle of Hindu law, it rather proceeds on the ground that there had been a long series of decisions affirming this proposition, and that many sales had taken place and titles had been accepted on the faith of these decisions which it would be unjust to disturb. And although the Chief Justice describes the transaction as a relinquishment rather than a surrender, the decision can hardly be placed on that ground. No doubt when a woman becomes incapable of holding property by physical death, or by entering a religious order, she relinquishes her husband's estate: this can hardly be said to be the case when she converts his estate into money and continues in the enjoyment of it in another form.

The views of the various High Courts in India on the question of alienations by a widow were considered by the Judicial Committee in 1907, in the case of *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*,[2] in which without pronouncing an opinion as to the grounds on which the principle is to be placed, their Lordships say, the principle being admitted by the High Courts in India, the *quantum* of consent has to be considered.

The result of these two decisions, which are both binding on us, to establish that a widow can, without proof of legal necessity, alienate the whole of her husband's estate with the consent of the then next reversioner. But they leave the

[1] (1884) I. L. R. 10 Calc. 1102.
[2] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

principle on which such alienations are to be supported open—the Full Bench being decided on the ground that it would be unjust to disturb what had been settled by a long series of decisions, while the Judicial Committee affirm that the principle is admitted, but do not say on what ground it is to be taken as established.

It is contended by the appellant that the widow's power to make a title to a portion of her husband's estate cannot be placed on the ground that she has a power to relinquish, but that to justify a sale or mortgage of a portion of the estate there must be legal necessity, and that the consent of the then reversioner is, at its highest, only evidence that legal necessity existed, or at any rate that the transaction was a proper one; while for the respondent it is contended that the widow and the reversioner, for the time being, represent the estate and are able to make a good title to the whole or any part of it, or to mortgage it or any part of it, so as to bind those who happen to be the heirs of the deceased husband at the widow's death.

The former view is supported by the case of *Behari Lal* v. *Madho Lal Ahir Gayawal*,[1] which was decided by the Privy Council in 1891. This was, however, a case of a peculiar character. The widow did not convey out and out to the next reversionary heir, but gave the estate to him subject to her having the estate for life. Before the widow died another reversionary heir had come into existence, and it was held that the *ekrarnama* executed by the widow could not operate to defeat that reversioner.

But the conveyance passed no estate in possession at the time it was executed. It was not to affect the possession of the property until after the widow's death. This might well be said not to be a conveyance of the estate to the then next reversioner, for it was a conveyance to a person who might or might not be next reversioner at the time when the property passed under the conveyance.

The Privy Council lay down that it was essentially necessary that the widow should withdraw her whole life-estate, so that the whole estate should get vested in the grantee, and say that

[1] (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 30.

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this will be a practical check on the frequency of such conveyances. It is not quite clear, I think, whether their Lordships meant by the words "whole estate" every *bigah* of land of which the estate consisted—or whether they meant the absolute estate, as contrasted with an estate subject to a preceding life interest. For the purposes of the judgment, the latter proposition was necessary, not the former.

I do not think that this case can be regarded as affording an answer in the negative to the question submitted to us. If the words "whole estate" mean every foot of land, then the case would afford an answer to the question, but I think that the words "whole estate" refer to the nature of the estate in the property conveyed—and that the case does not afford an answer to the question before us.

It is, however, inconsistent with the proposition that the widow and the next reversioner completely represent the estate and are able to make such disposition of it as they choose—if they could they would be able to make the disposition which the Privy Council have held cannot be made—and it is an authority for the proposition that a widow cannot, even with the consent of the next reversioner, retain possession of the estate and make a disposition of it to take effect at a future time.

We are led, therefore, to the proposition that a widow can alienate with the consent of the next reversioner, but such an alienation must be complete and effective, *i.e.*, she must not retain possession of the property.

The question of difficulty is to say on what principle of law is this power in the widow to be supported. Is it on the ground that she can relinquish in favour of a reversioner, or on the ground that the consent of the reversioners is evidence that she is acting within her powers in alienating the estate?

The instances given of relinquishment are those in which the widow does something which destroys her capacity for holding property—such as incurring a voluntary death, or entering a religious order. I think, if relinquishment is to be taken in its strict sense, it would involve something which rendered the widow no longer capable of being her husband's heir. It is true, nevertheless, that the texts recognise gifts

by the widow of a portion of the estate to her husband's kindred as meritorious. She appears, therefore, to have had a power of alienating portions of the estate, while she still filled the position of being the possessor of the estate; but these powers, whether of relinquishing the whole estate by entering a religious order or alienating part by giving it to her husband's kindred, only enabled her to benefit the heirs of her husband, and did not enable her to get any advantage for herself.

I do not, therefore, think that her power to alienate for valuable consideration can be placed on either of these grounds, for I think that when a widow converts her husband's property into money and enjoys that, she cannot be said to relinquish it, nor can she be said to make a gift when she receives valuable consideration for the conveyance.

Is it then to be taken that the consent of the next reversioners is evidence of the propriety of the transaction? If it be taken merely as evidence, then it is open to be rebutted—and it can be shewn that there was in fact no legal necessity for the conveyance; if, on the other hand, it is conclusive evidence, then it affords an answer to the question.

It is clear that a widow for her religious or charitable purposes, or for those which were supposed to conduce to the spiritual welfare of her husband, or under pressure of legal necessity, is entitled to sell or mortgage the whole or any portion of her husband's estate.

The transaction, therefore, was not one which lay wholly outside the power of the widow. She might deal with the estate under certain circumstances, and if the consent is to be taken as conclusive evidence that these circumstances exist, there is an end of the question.

In the case of *Kalee Mohun Deb Roy* v. *Dhananjoy Shaha*,[1] decided in 1886, the consent of the then next reversioner was treated as evidence of the existence of legal necessity. The Judges do not say it was conclusive evidence: they say it gives rise to a strong presumption that such necessity existed in the absence of evidence of the want of legal necessity.

The case of *Pulin Chandra Mondal* v. *Bolai Mandal*,[2] decided in 1908, goes so far as to affirm the proposition that

[1] (1886) 6 W. R. 51.

[2] (1908) I. L. R. 35 Calc. 939.

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an alienation of a portion of the husband's estate by the widow is valid even though there is no legal necessity, if made with the consent of the then reversioner. This case goes further than the case of *Heb Chunder Sanyal* v. *Saruamoyi Debi*, [1] decided in 1894, in which it is laid down that the widow may convey to the next reversioner or to a third party, with the consent of the next reversioner, the whole or any portion of the estate, and the transferee will acquire an absolute interest. The Judges, however, after discussing the texts and the cases say that they are not prepared to hold that the widow and the next reversioner are competent to deal with the property so as to convert the widow's estate (the property remaining in her) into an absolute estate.

The former of these two cases supports the proposition contended for by the respondent, but on the question whether the alienation would be held to be good, even if it were established that no legal necessity existed, the case of *Pulin Chandra Mandal* v. *Bolai Mandal*, [2] is inconsistent with the earlier case of *Kalee Mohun Deb Roy* v. *Dhunanjoy Shaha*, [3] and, moreover, it lays down what is not consistent with the judgment of the Privy Council. In *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*, [4] their Lordships say in reference to the effect of the consent of the husband's kindred, "there should be such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one": and while saying it is not a *præsumptio juris et de jure*, they say, "it is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

I think that the conclusion to be drawn from the cases is to show that the widow, with the consent of the then next reversioner, has the power of making an alienation of the whole or any portion of her deceased husband's estate—but that the power is limited to the extent that no act done by the widow, with the concurrence of the then next reversioner, or by the then next reversioner, can have the effect as against the actual

[1] (1894) I. L. R. 22 Calc. 354.
[2] (1908) I. L. R. 35 Calc. 939.
[3] (1866) 6 W. R. 51.
[4] (1869) 3 B. L. R. (P. C.) 57; 13 Moo. I.A. 209.

reversioner of giving the widow a greater estate in the property than she has under the Hindu law : see *Hem Chunder Sangal* v. *Saruamoyi Debi*.[1] The widow and next reversioner are not, therefore, enabled jointly to deal with the estate as though their joint power was equivalent to that of an absolute owner.

I think the principle on which an alienation by the widow with the consent of the next reversioner is to be supported is that it raises a strong presumption that at the time of the alienation the persons then interested in preventing the alienation were unable to dispute its propriety, or, in other words, that circumstances existed which enabled the widow in accordance with the rules of Hindu law to alienate the estate so as to destroy the interest which might in future descend on the next reversioners as heirs to her deceased husband. The presumption is a very strong one ; and though not absolutely irrebuttable, evidence to rebut it would not affect the validity of the transaction, if it were established that the mortgagee or purchaser had given valuable consideration, and had acted *bonâ fide*, believing, on the faith of such consent, that circumstances justifying the alienation existed. I would therefore answer the question submitted to us in the terms which have been proposed by my Lord.

STEPHEN J. In answering the question referred to us, we have to deal with only one of the two methods by which a Hindu widow can alienate the property of her deceased husband in which she has inherited an estate. For present purposes, it may be taken for granted that her alienation of the whole or part of it can be supported by proof that it was necessary, or, what is practically the same thing, for the purpose of benefiting her husband's kindred in one of the limited number of ways prescribed in the Hindu texts, with which we are not immediately concerned. Furthermore, proof of due enquiry by the purchaser into the necessity of the alienation, leading to an honest belief on his part that necessity exists, is taken to be a proof of necessity, as far as he is concerned.

Taking this to be so, the question to be decided is : What is the effect of the consent to the alienation of the next heir to

[1] (1894) I. L. R. 22. Calc. 354.

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the deceased husband for the time being? And on a review of the authorities that have been quoted to us, by which we are bound, the answer seems to me as follows. In the first place, there is no doubt that the consent of the kindred, not necessarily the next heir of the deceased husband, to alienation by a Hindu widow is evidence that "the transaction was a fair one; and one justified by Hindu law," but it seems that the effect of such concurrence is at most to raise a presumption: *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*.[1] Even for this purpose the consent of all the kindred is necessary, and the circumstances of the concurrence of any of them must be considered: *Sham Sundar Lal* v. *Achhan Kunwar*.[2] Ordinarily, the consent of the whole body of persons constituting the next reversioners should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible: *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*.[3] I feel some difficulty in appreciating the full scope of this rule, but I have no doubt that it applies to a case when the consent of a reversioner is relied on as affording evidence of the necessity of an alienation. On principle and on authority these rules apply where the alienation is of the whole or a part of the widow's estate.

In the second place, consent to the widow's alienation has an effect on that alienation in cases where the widow may be supposed to have relinquished her rights over her deceased husband's property. That a Hindu widow can cede and relinquish her rights in favour of the reversioner is clearly laid down by Romesh Chandra Mitter J. in *Gnuga Pershad Kur* v. *Shumbhoonath Burmun*[4] relying on the decision in *Sreemutty Jadomoney Dabee* v. *Saradaprosono Mookerjee*.[5] The decision in this case was confirmed on a Letters Patent Appeal, and its principle is recognised by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*,[6] where it is said that "the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate," but it is "essentially

[1] (1869) 13 Moo. I.A. 209.
[2] (1898) I. L. R. 21 All. 71; L. R. 25 I. A. 183.
[3] (1907) I. L. R. 30 All. 1 L. R. 35 I. A. 1.
[4] (1874) 22 W. R. 393.
[5] (1856) 1 Boulnois 120; 3 I.D. (O. S.) 72
[6] (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 30.

necessary" for her "to withdraw her own life-estate, so that the whole estate should get vested at once in the grantee." The principle is also recognised by a decision of a Full Bench of this Court in *Nabokishore Sarma Roy* v. *Hari Nath Sarma Roy*,[1] but a conclusion is drawn from it by which I conceive that we are bound, and which in my opinion carries the matter very much further. In that case a widow sold to a stranger a share in a *taluk*, which I understand to have been treated as the whole of the property inherited by her from her deceased husband. The reversioner then executed a separate document in which he assented to the conveyance by the widow, and covenanted for himself and his heirs that he would not lay claim to the property at any future time. The reversioner then predeceased the widow, and on her death the person who succeeded to the property was one who was not bound by the covenant of the previous reversioner. On these facts, Garth C. J., after referring to the principle of relinquishment, points out that it frequently happens "that a widow who is anxious to turn her husband's estate into money, may arrange with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. They may both share in the profits of such a transaction," and thus the person who would be the next male heir to the deceased husband at the time of the widow's death is deprived of his rights. He then goes on—"But, if it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may thus agree to make." After quoting authorities he goes on—"To allow the widow to relinquish her estate to the next male heir of her husband, is one thing; but to allow her to sell the whole inheritance, without any legal necessity, *merely with the consent of the next male heir* so as to bar the rights of other heirs of her husband in the future, is another thing." He then concludes, on authority and on grounds of practical convenience, that it is impossible to hold that the widow may not sell the estate in the way described. Mitter J., after pointing out that a widow can relinquish the whole of her estate to the next heir,

[1] (1884) I. L. R. 10 Calc. 1102.

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adds : " But, if the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as logical consequence, that she can alienate it merely with his consent, without any legal necessity," referring to the decision in *Mohunt Kishen Geer* v. *Bugget Ray*[1] to show that the one proposition follows as a logical consequence of the other.

This decision is based on the principle of relinquishment, though that principle is not distinguished from, or contrasted with, the principle of consent being evidence of the propriety of the alienation, and, as I understand the matter, a sale by the widow with the consent of the reversioner is held on authority and for purposes of practical convenience to be equivalent to a relinquishment by the widow in favour of the reversioner, and a conveyance by him.

The difference between a sale by the widow with the consent of the reversioner, and a sale by the reversioner after a relinquishment by the widow, may be to some extent a matter of form, a view to which the Judges who decided *Mohunt Kishen Geer's* case[1] seem to have inclined; but Garth C. J. expressly contemplates a case in which the sale is not only formally, but actually, by the widow, because he supposes it to be made for the common benefit of the widow and the reversioner, and that they share in the profits of the transaction. A sale by which the widow receives the price of her husband's property does not seem to be a relinquishment, as that term is used in earlier cases and in the later case of *Behari Lal* v. *Madho Lal Ahir Gayawal*,[2] but there I read this case as extending the meaning of relinquishment so as to make it indistinguishable, as far as I am concerned, from alienation, and I find nothing in the later case in the Privy Council overruling this construction. Personally I am fortified in this view by finding that Banerjee J. in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*[3] acquiesced in the decision in *Nobokishore's* case,[4] however unwillingly he may have done so, and we are as much bound by it as he was.

[1] (1870) 14 W. R. 379.
[2] (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 30.
[3] (1894) I. L. R. 22 Calc. 354.
[4] (1884) I. L. R. 10 Calc. 1102.

On my view of the effect of the decision in this case, a difficulty arises as to whether the decision covers an alienation of a part as well as of the whole. In its terms, it seems not to, but in principle there is no reason why it should not, and the Court in *Hem Chunder Sanyal's* case[1] seems to have thought it did: on the other hand, the decision in *Behari Lal's* case[2] which was given after *Nobokishore's* case,[3] though it does not notice it, and before *Hem Chunder Sanyal's* case[1] is unmistakably clear as to the necessity for a relinquishment being of the whole property.

Under these circumstances, I consider that the decision in *Nobokishore's* case[3] makes a sale by a Hindu widow of all her interests in the property that she has inherited from her husband competent to pass an absolute title to the transferee, if it is made with the consent of the then heirs of her husband, and it has not been suggested in this case that a mortgage is to be distinguished in this respect from a sale. How far this rule may extend it is not necessary to consider exactly on the present occasion, though I think it may safely be said that it might lead us out of sight of our starting point in the Hindu Law. But I do not think we are bound to apply the rule in question to a case where, as in the one before us, only a portion of the property in which the widow is interested is affected by her action. In *Bajrangi Singh's* case[4] where the law laid down in *Nobokishore's* case[3] seems to be approved of, the widow executed successive transfers of all the property she inherited from her husband; she then died, and subsequently persons who, in view of the judgment of the Privy Council, must be taken to represent the reversioners at the time, ratified the widow's alienations. If we take this case to be decided on the theory of relinquishment as well as on that of necessity being presumed from consent, which I think we must, the ratification applies at least to a complete alienation and the case is therefore no authority for extending the rule laid down in *Nobokishore's* case[3] to an alienation of a part. This follows from a

[1] (1894) I. L. R. 22 Calc. 354.
[2] (1891) I. L. R. 19 Calc. 236; L.R. 19 I. A. 30.
[3] (1884) I. L. R. 10 Calc. 1102.
[4] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

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consideration of the facts of the case, but it is also to be observed that their Lordships do not consider that they are laying down any new principle, and express themselves as being "unwilling to extend the widow's power of alienation beyond its present limits." I therefore concur in the answer to the question before us suggested by the Chief Justice.

MOOKERJEE J. The question referred for decision to the Full Bench has been formulated as follows:

"Is the alienation, by way of mortgage by a Hindu widow of a portion of the estate of her husband, without any proved legal necessity, but with the consent of the next reversioner for the time being, valid and binding on the actual reversioner who is not the heir of the consenting reversioner?"

The texts relevant for the determination of this question are those of Katyayana, Vyasa and Narada, quoted by Jimutavahana in the Dayabhaga, Chapter XI, section I, paragraphs 56, 60, 64:

"Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it."

Katyayana.

"For women, the heritage of their husband is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."

Mahabharata.

"When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property, and care of herself, as well as in her maintenance, they have full power. But, if the husband's family be extinct or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a sapinda."

Narada.

From these texts, Jimutavahana draws the inference that it is competent to the widow to enjoy the estate for life, which goes, upon the termination of her interest, to the heirs of her husband; it is also competent to her to make a gift or sale for the obsequies of her husband, and for other religious and charitable purposes; she may also, in case of necessity, mortgage

the property, or sell or otherwise alienate it. We have consequently the principle that a widow can alienate the corpus of the property inherited by her for purposes of necessity, she can sell it, or mortgage it, and, in certain cases, she can even make a gift of a reasonable portion of it: *Collector of Masulipatam* v. *Cavaly Venkata*.[1] Upon this fundamental principle, has been engrafted, by judicial decisions, the equitable doctrine that a transferee is protected if he proves that he made proper and *bonâ fide* enquiries as to the actual existence of such alleged necessity, and did all that was reasonable to satisfy himself as to the existence of such necessity: *Amarnath Sah* v. *Achan Kuar*,[2] *Bhagwat Dayal Singh* v. *Debi Dayal Sahu*[3] *and Hunooman-persaud Pandey* v. *Babooee Munraj Koonweree*.[4] It is, therefore, firmly settled that a widow takes only a restricted estate in the property of her husband, and that, at her death, it passes to the heirs of her husband, except as to such portion as may have been alienated by her for legal necessity [*Govindchund Bysack* v. *Cossinaut Bysack*[5]], and it is beyond controversy that, upon this point there is no difference between the Dayabhaga and the Mitakshara schools of Hindu law: *Keerut Singh* v. *Koolahul Singh*,[6] *Collector of Masulipatam* v. *Cavaly Venkata Narrain-apah*,[1] *Mussumat Thakoor Deyhee* v. *Rai Baluk Ram*,[7] *Bhugwandeen* v. *Myna Baee*.[8]

The question next arises, whether, apart from legal necessity, a widow is competent to alienate the corpus of the property inherited by her, with the consent of the then next reversioners, so as to bind the person who turns out to be the actual reversioner at the time of her death. This question was answered in the affirmative by the Bengal Sadar Court in *Hem Chund Mujoomdar* v. *Mussummaut Jara Munnee*,[9] *Gocul Chund*

[1] (1861) 8 Moo. I.A. 529; 2 W. R. (P.C.) 61.
[2] (1908) I. L. R. 35 Calc. 420; L. R. 35 I. A. 48.
[3] (1856) 6 Moo. I.A. 393; 18 W. R. 81 n.
[4] (1826) Montr. H. L. C. 477; 1 I.D. (O.S.) 292.
[5] (1839) 2 Moo. I.A. 331; 5 W.R. (P.C.) 131.
[6] (1892) I. L. R. 14 All. 420; L. R. 19 I.A. 196.
[7] (1866) 11 Moo. I.A. 139.
[8] (1867) 11 Moo. I.A. 487; 9 W. R. (P.C.) 23.
[9] (1811) 1 Mac. Sel. Rep. 481; 6 I.D. (O.S.) 352.

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Chuckerwurtee v. *Mussummaut Rajrance*,[1] *Mussummaut Bijya Dibeh* v. *Mussummaut Unpoorna Dibeh*,[2] and *Bindrabun Chund Rai* v. *Bishn Chund Rai*.[3] The reason for this conclusion does not appear to have been clearly formulated, even if appreciated in the earlier decisions. But reference is made in more than one place to the fact that according to the text of Narada, the relations of the husband are the natural guardians of the widow and they are not likely to consent to an alienation, unless there is justifying necessity for it. In a very early case, however, *Mohun Lal Khan* v. *Rance Siroomunee*,[4] the question was pointedly raised as to who were the relations of the husband whose consent was essential to validate the alienation by the widow. It was ruled that an alienation by the widow to be valid must bear the assent of the next heirs and the paternal kindred of her husband, and the same view was affirmed in *Roopchurn Mohapater* v. *Aunudlal Khan*.[5] The point arose for consideration before the Judicial Committee in *Rany Srimuty Dibeah* v. *Rany Koond Lata*,[6] but was not decided, though their Lordships referred without disapproval to *Mohun Lal Khan* v. *Rance Siroomunee*,[4] the decision wherein was stated to have been "founded expressly on the ground that the deed then in question was executed without the concurrence of the descendants in the male line, who, though they were not heirs, were guardians or protectors of the widow." A similar view was accepted by the Bengal Sadar Court in *Hafzoonnissa Begum* v. *Radhabinode Missur*.[7] See also *Nundkomar Rai* v. *Rajindurnaraen*,[8] *Mussummaut Bhuwani Munee* v. *Mussummaut Solukhan*.[9] This view, however, was repudiated by the Supreme Court in a case decided shortly after. *Jadomoney* v. *Saradaprosono*,[10] in which it was ruled that the reversioners whose consent was necessary to

[1] (1816) 2 Mac. Sel. Rep. 213; 6 I.D. (O.S.) 521.
[2] (1806) 1 Mac. Sel Rep. 215; 6 I. D. (O.S.) 159.
[3] (1826) 4 Mac. Sel. Rep. 180; 7 I.D. (O.S.) 134.
[4] (1812) 2 Mac. Sel. Rep. 40; 6 I.D. (O.S.) 389.
[5] (1812) 2 Mac. Sel. Rep. 45; 6 I. I. D. (O.S.) 392.
[6] (1847) 4 Moo. I.A. 292; 7 W. R. P.C. 44.
[7] (1856) Beng. S. D. A. R. 595.
[8] (1808) 1 Mac. Sel. Rep. 349; 6 I. D. (O.S.) 256.
[9] (1811) 1 Mac. Sel. Rep. 431; 6 I.D. (O.S.) 315.
[10] (1856) 1 Boulnois 120; 3 I. D. (O.S.) 72.

validate an alienation by the widow consisted of that class of persons only who would immediately succeed to the estate if the widow's interest was determined, and did not include that wider class of persons who might by possibility become heirs on the happening of that event. Sir Charles Jackson J. observed that where the widow's conveyance is executed with the consent of all the nearest heirs living at the time of conveyance, and there are no other heirs of preferable or equal degree living at the decease of the widow, the whole estate in possession and the reversion has been sufficiently represented for the purpose of such conveyance, and the conveyance itself is valid.

The learned Judge referred to the note of Mr. Colebrooke to the case of *Mahoda* v. *Kuleani*[1] to the effect that a "widow's gift of the estate to the next heir is good in law, as such a gift is a mere relinquishment of her temporary interest in favour of the next heir; it may, however, happen that the person who would have been entitled to take the inheritance at her decease might be different from the one who obtained it under gift or relinquishment to him as presumptive heir, and if the title of that person be either preferable or equal, it may invalidate such gift in whole or in part." Here we see the origin of what may be called the relinquishment theory, first formulated by Mr. Colebrooke, and applied, possibly unconsciously, in the cases of *Mussummaut Bijya Dibeh* v. *Mussummaut Unpoorna Dibeh*,[2] *Collychund Dutt* v. *Moore*,[3] and *Ramdhun Bukshe* v. *Punchanun Bose*.[4] Sir James Colvile, C.J., in the same case, *Jadomoney* v. *Sarodprosono*,[5] expressly adopts the relinquishment theory as consistent with the letter and spirit of the Hindu law. He first described the nature of the estate of a Hindu widow in the words of Lord Gifford in *Cossinaut Bysack* v. *Govindchand Bysack*,[6] and accepts the view of the true position of a reversioner as defined by Sir Lawrence Peel, in *Oojulmoey Dossee* v. *Sagormoney Dossee*,[7] and *Hurry Doss*

[1] (1803) 1 Mac. Sel. Rep. 84; 6 I. D. (O. S.) 62.
[2] (1805) 1 Mac. Sel. Rep. 215; 6 I. D. (O. S.) 159.
[3] (1837) Fulton 73; 1 I. D. (O. S.) 687.
[4] (1853) Beng. S. D. A. R. 641.
[5] (1856) 1 Boulnois 120; 3 I. D. (O. S.) 72.
[6] (1826) Moutr. H. L. C. 477 1 I. D. (O. S.) 292.
[7] (1850) 1 Tay. & Bell. 370 2 I. D. (O. S.) 491.

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Dutt v. *Rajunmoney Dossee*.[1] The learned Chief Justice then points out that the policy of the Hindu law is not to keep the estate, as long as possible, inalienable and subject to a species of entail in favour of persons unascertained, but to prevent the alienation of family property from taking place, either by operation of law in favour of the widow's natural heirs, who would generally be other than the heirs of her husband, or in favour of strangers, by the gift or other disposition of the widow. Reference is made in support of this view to the Dayabhaga of Jimutavahana, Chapter XI, Section 1, paras. 63 and 64. As a matter of fact, the theory of relinquishment is foreshadowed in the Dayabhaga, Chapter XI, Section 1, para. 59, where Jimutavahana lays down that the persons who would be the next heirs on failure of prior claimants, succeed to the residue of the estate remaining after her use of it, upon the demise of the widow in whom the succession had vested, in the same manner as they would have succeeded if the widow's right had never taken effect. The words used by Jimutavahana जाताधिकारया: पत्रा अधिकार प्रध्वंसेऽपि भोगावशिष्टं धनं गृह्णीयु: (" if her right ceases or never takes effect ") are comprehensive enough to include, not merely the case of the death of the widow, but all cases where her right ceases ; in other words, the reversioners take the state, not merely when the widow dies, but also when her title is extinguished, for instance by renunciation, remarriage or the like. It is plain, therefore, that in 1856 two principles were recognised by our Courts. According to one principle, an alienation by a widow, made with the consent of all the possible heirs of her husband, was held operative because the consent of persons who were the guardians of the widow, and who were, as the next possible takers of the estate, most deeply interested in its preservation, indicated the propriety of the transaction : *Kalee Mohun Deb Roy* v. *Dhunanjoy Shaha*,[2] *Madhub Chunder Hajrah* v. *Gobind Chunder Banerjee*.[3] According to the other principle, an alienation by a widow, made with the consent of the entire body of the immediate reversioners, was held operative, because between the widow and the reversioners the entire estate was represented, inasmuch as

[1] (1851) 2 Tay. & Bell. 279 ; 2 I. D. (O. S.) 744.
[2] (1866) 6 W. R. 51. [3] (1868) 9 W. R. 350.

the widow might relinquish her estate in favour of the reversioners and create in them a present indefeasible interest. These two doctrines, as is plain from an examination of the texts and from the history of the judicial decisions on the subject, were entirely distinct in their inception and development. But, as an examination of the cases shows, the distinction was subsequently overlooked, and the indiscriminate application of the two principles has caused much embarrassment.

In so far as the consent theory is concerned, it is plainly indicated by Turner L. J. in *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* [1] in the following passage: "It may be taken as established that an alienation by her (the widow) which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband, or on their failure, the fetter on the widow's power of alienation altogether drops. *The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper.*"

The same view is emphasised by Sir James Colvile in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhury* [2]: "their Lordships do not mean to impugn those authorities which lay down that a transaction of this kind may become valid by the consent of the husband's kindred, but the kindred in such case must generally be understood to be all those who are likely to be interested in disputing the transaction. At all events, there should be *such a concurrence of the members of the family, as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law.* That it can be a presumption of law in the sense of *praesumptio juris et de jure*, their Lordships do not think. It is, no doubt, an element to be taken into consideration, and deserving of considerable weight in the estimation of all the evidence of the transaction."

[1] (1861) 8 Moo. I. A. 529; 2 W. R. (P. C.) 61.
[2] (1869) 13 Moo. I. A. 209.

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Again, in *Sham Sundar Lal* v. *Achhan Kunwar*,[1e] Lord Davey gives expression to the theory that consent of reversioners merely affords proof of the propriety of the transaction, in the following terms: "At the date of the bond of 1877, Hulas Kuar, as the heir of Khairati Lal was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and, would, if she survived her mother, become her father's heir and take the estate, subject to the same restriction. Inayat Singh was one of the two male heirs next in succession to the restricted estate who would be full owners in the event of their surviving their grandmother and mother. Inayat was moreover a minor. At the date of the bond of 1881, Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation and Inayat Singh was one of the heirs apparent. At both dates Inayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Inayat Singh (even if he had been of age), could by Hindu law make a disposition or bind their expectant interests, nor does the deed apply to any but rights in possession, and in 1881 Inayat Singh was equally incompetent to do so, though the deed purports to bind future rights. To give validity to the bonds as against the estate of Khairati Lal, the plaintiffs and appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate, or, at least, that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds, or either of them, *and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption, from such concurrence as there was of Achhan Kunwar and Inayat Singh in the first bond or of Inayat Singh in the second bond, that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect.*"

[1e] (1898) I. L. R. 21 All. 71; L. R. 25 I. A. 183.

On the other hand, the relinquishment theory was clearly explained by Lord Morris in the case of *Behari Lal* v. *Madho Lal Ahir Gayawal* [1] in the following terms: "At the time of the execution of the *ikrarnama*, Madho Lal was not born, so that the plaintiff was then the apparent reversionary heir, subject to the life estate of his grandmother, Lachoo Dai; *it may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee. The necessity of the removal of the obstacle of the life estate is a practical check on the frequency of such conveyances.*"

The two doctrines, thus formulated and applied, came up for examination by their Lordships of the Judicial Committee in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*,[2] and it is remarkable that neither theory was expressly repudiated or approved, though detailed reference was made to judicial decisions in which either the one or the other principle had found acceptance. Under these circumstances, I think, the inference may legitimately be drawn from the decision of their Lordships in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*,[2] that both the doctrines are well founded on principle: the only question is, what are the limitations or qualifications, if any, subject to which each of these doctrines has to be applied. If the widow has alienated the whole of the estate of her husband with the consent of some only of the immediate reversioners, or, if she has alienated a part only of the estate of her husband with the consent of all the immediate reversioners, or, again, if she has alienated part of the estate of her husband with the consent of some only of the immediate reversioners, the consent merely furnishes evidence of the propriety of the transaction or of the fact that the transferee has taken after due enquiry as to the existence of legal necessity. The presumption which thus arises from the consent of the reversioners is not conclusive and is rebuttable; but, plainly, there is no room for the application of the relinquishment theory. In each of these cases,

[1] (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 80.

[2] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.

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either the widow does not absolutely convey and destroy her limited estate or she does not accelerate the estate of the entire body of immediate reversioners. On the other hand, if the widow transfers the entire estate of her husband with the consent of the whole body of immediate reversioners, the relinquishment theory becomes forthwith applicable; the position is precisely the same as if the widow had withdrawn completely and in its entirety her own qualified estate, and the whole estate had vested at once in the entire body of immediate reversioners, who, upon this acceleration of their estate, had conveyed an absolute interest to the transferee. The distinction between the two classes of cases is fundamental and well marked, and if it is borne in mind, we can appreciate without difficulty why Sir Andrew Scoble observes in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*[1] that ordinarily the consent of the whole body of persons constituting the next reversioners should be obtained, as laid down in *Radha Shyam Sircar* v. *Jay Ram Senapati*,[2] but that there may be cases in which special circumstances may render the strict enforcement of this rule impossible. This view is consistent only with the doctrine that consent of reversioners, in certain classes of cases as already explained, merely furnishes presumptive evidence of the propriety of the transaction; from this standpoint, the rule laid down in *Ramphal Rai* v. *Tula Kuari*[3] cannot be sustained. On the other hand, the class of cases to which the relinquishment theory is applicable is easily defined; they are cases in which two elements are present, namely, *first*, a transfer by the widow of the entire inheritance in her hands, and, *secondly*, the consent of the entire body of persons who would be entitled to succeed upon the extinction of the qualified estate of the widow. This view, I venture to think, does not really militate against the decision of the Full Bench in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*.[4] Sir Richard Garth clearly contemplated a case in which the analogy of relinquishment of her estate by the widow could be applied; he speaks explicitly of the death of the widow or of the renunciation of the world by her, or of some act by her which might in the eye of law

[1] (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.
[2] (1890) I. L. R. 17 Calc. 896.
[3] (1883) I. L. R. 6 All. 116.
[4] (1884) I. L. R. 10 Calc. 1102.

justify the inference that she was civilly dead. The learned Chief Justice also refers to the contingency of a disclaimer by her at the time of the death of her husband. In each of these instances, her interest in the entire estate left by her husband would be withdrawn from her and become vested in the then immediate reversioners. Mr. Justice Romesh Chandra Mitter is equally explicit on the point. He plainly contemplated a relinquishment of the entire estate by the widow in favour of the then next male heir of her husband. I am not unmindful that Mr. Justice Banerjee, who, when at the Bar successfully argued the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*,[1] on behalf of the respondent, stated in the case of *Hem Chunder Sanyal* v. *Sarnamoyi Debi*,[2] that the principle of the Full Bench decision is applicable to transfers of part of the estate as of the whole, and this was subsequently accepted without question in *Pulin Chandra Mandal* v. *Bolai Mondal*.[3] An examination of the record, however, in the case of *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[1] does not confirm the view taken by Mr. Justice Banerjee; on the other hand, so far as I can gather, the alienation in controversy covered the entire estate and was made with the consent of the entire body of immediate reversioners. The two points which were considered by the Full Bench were in essence these, namely, *first*, whether a transfer by the widow with the consent of the immediate reversioner could be treated as equivalent to a transfer by the widow to the reversioner followed by a transfer by the latter to the alience, and, *secondly*, whether a transfer by the widow to the immediate reversioner stood on the same footing as a real relinquishment by her. Upon the first point, it was ruled, in consonance with previous decisions [*Shama Soondaree* v. *Shurut Chunder Dutt*,[4] *Mohunt Kishen Geer* v. *Busseet Roy*,[5] *Gunga Pershad Kur* v. *Shumbhoonath Burmun*,[6] *Mudhoosoodun Doss* v. *Mohenderlall Khan*[7]], that the question was one of form rather than of substance, and, that, consequently, a conveyance by the widow with the assent of the immediate reversioner might be deemed to operate precisely in the same manner as two conveyances, one

[1] (1884) I. L. R. 10 Calc. 1102.
[2] (1894) I. L. R. 22 Calc. 354.
[3] (1908) I. L. R. 35 Calc. 939.
[4] (1867) 8 W. R. 500.
[5] (1870) 14 W. R. 379.
[6] (1874) 22 W. R. 39.
[7] (1859) 2 Boulnois 40; 3 I. D. (O. S.) 454.

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by the widow to the reversioner and the other by the reversioner to the transferee. Upon the second point, Sir Richard Garth was inclined to take the view that a sale of the whole inheritance by the widow to the immediate reversioner did not stand on the same footing as a real relinquishment by her, and, apparently, Mr. Justice Pigot was of the same opinion; but, in view of a series of prior decisions of this Court [*Raj Bullubh Sen* v. *Oomesh Chunder Rooz*,[1] *Trilochun Chuckerbutty* v. *Umesh Chunder Lahiri* [2]], they acceded to the contention that a transfer of the whole inheritance to the next male heir might be treated as a relinquishment by her in his favour. If the matter were *res integra*, I would without hesitation adopt the view that a sale by the widow of the entire inheritance to the then immediate reversioner does not possess the characteristics of a real relinquishment by her, as contemplated by Hindu law-givers. A widow who transfers the property for a consideration or retains an interest in the purchase money, cannot, by any stretch of language, be deemed to have relinquished her interest in the estate of her husband; the estate by her action, has, in essence, only undergone a transformation, and the immovable property has been converted into money which may be shuffled out of sight as land never can be. But if this strict view was not acceptable in 1884 on the ground of *stare decisis*, much less can it be pressed now; I do not, therefore, rest my conclusions on this, the strictly logical view of the matter, especially in view of the fact that if the relinquishment theory is restricted in application only to cases where there is a real relinquishment, that is, a real abandonment by the widow of her interest, the stringency of the rule may be evaded in practice by the execution of a formal deed of relinquishment and a secret payment of consideration to the widow or a separate agreement to pay her maintenance allowance for life. I assume, consequently, as Sir Richard Garth did, that when a widow sells the entire inheritance to the immediate reversioner, she relinquishes her estate in his favour; this view was in substance adopted by Lord Morris in *Behari Lal* v. *Madho Lal Ahir Gayawal* [3] when he stated that according

[1] (1878) I. L. R. 5 Calc. 44.
[2] (1880) 7 C. L. R. 571.
[3] (1891) I. L. R. 19 Calc. 236; L. R. 19 I. A. 30.

to Hindu Law *the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate.* Beyond this proposition, based, as we have seen, on somewhat questionable grounds, we need not go, and, as I read the judgments in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*,[1] we are not required to go even by the Full Bench decision. The principle of that decision is applicable only when the transfer by the widow is of her entire interest in the estate inherited by her from her husband, and is made with the consent of the whole body of immediate reversioners; an extension of that principle to cases where either of these elements is absent is not warranted by the language used by the learned Judges, nor can it be deemed a logical development of the principle acknowledged by them as the foundation of their decision.

Upon an examination, then, of the texts and judicial decisions applicable to this matter, and upon a review of the principles which underlie them, the following propositions appear to be deducible :

(i) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.

(ii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that he made proper and *bonâ fide* enquiry as to the actual existence of legal necessity, and did all that was reasonable to satisfy himself as to the existence of such necessity.

(iii) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, with the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and *bonâ fide* enquiries and had satisfied himself as to the existence of such necessity. The *quantum* of consent necessary to raise this presumption depends

[1] (1884) I. L. R. 10 Calc. 1102.

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upon the facts of each particular case, and, in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

(iv) When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death.

In view of this exposition of the law, I hold, in entire concurrence with the learned Chief Justice, that the question referred to the Full Bench should be answered as follows :

When an alienation by way of mortgage has been effected by a Hindu widow in respect of a portion of the estate of her husband, with the consent of the next reversioner for the time being, such consent may raise a presumption that the transaction was for legal necessity or that the mortgagee had acted therein after proper and *bonâ fide* enquiry and had satisfied himself as to the existence of such necessity, but this presumption, when it arises, is rebuttable, and it is open to the actual reversioner to establish that there was in fact no legal necessity and that there had been no proper and *bonâ fide* enquiry by the mortgagee.

Holmwood J. I agree with my Lord. The facts of this case and many similar cases which come before the Courts clearly show that the consent of the next reversioners for the time being must be hedged in with safeguards, if there is to be any limit to the widow's powers of alienation.

A spendthrift young man who happens to be the next reversioner at the time of the alienation induces the widow to raise money on mortgage for his benefit to be spent by him on his own immoral or wasteful purposes. The only legal principle upon which such a condition of things could be justified is that the widow has entirely relinquished the estate to the next reversioner so as to cast on him the whole responsibility for the waste of the ancestral property. In the absence of such relinquishment there must be such a consent by the nearest reversioners as to raise a presumption that the transaction was a fair one and one justified by Hindu Law. Such a

presumption can only arise with reference to the circumstances of each case.

It is unnecessary to refer to those cases which have been dealt with in the judgment delivered by my Lord, where legal necessity is proved or presumed from facts. If the question is answered in the way my Lord the Chief Justice proposes to answer it, it seems to me that all difficulties will be met and salutary check will be put on the extension of the widow's power of alienation which is deprecated by their Lordships of the Judicial Committee in their latest decision.

Note.—The test, where a deed by a limited owner with qualified power of alienation is impeached, is, whether the purpose for which the alienation was made, was proper or legitimate. The limits of this power were defined by Turner L. J. in *Collector of Masulipatam* v. *Cavaly Vencata* 8 Moo. I.A. 529 (550): "The widow cannot of her own will alien the property, except for special purposes. For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity." To maintain that in every case where an alienation by a limited owner is impeached, legal necessity therefor must be established to support its validity, is to take a narrow and restricted view of the scope of the true rule on the subject. The test is, Is the transaction fair and proper, lawful and valid and justified by Hindu Law; necessity is only one of the phases of the test of propriety. See *Raj Lukhee* v. *Gokool*, 13 Moo. I.A. 209, *Shamsundar* v. *Acchan*, L. R. 25 I.A. 183 and *Bijay Gopal* v. *Girindra*, 19 C.L.J. 620 P.C.; I.L.R. 41 Calc. 793. Thus the widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely wordly purposes. An exhaustive enumeration of these religious or charitable purposes is not possible, but some of them may be mentioned by way of illustration, dowry to a daughter, building temples for religious worship, digging tanks and the like, *Cossinauth* v. *Hurosundari*, 2 Morley's Digest 119, and the excavation and consecration of a tank: *Khub Lal* v. *Ajodhya*, 22 C.L.J. 345. A Hindu widow, daughter, or mother, is entitled to alienate a small portion of the estate in her hands for religious purposes. See *Mahodo* v. *Kuleani*, 1 Mac. Sel. Rep. 82, *Ramchunder* v. *Gungagovind*, 4 Mac. Sel. Rep. 147, *Kartick* v. *Gour*, 1 W.R. 48, *Ranjeet* v. *Waris*, 21 W.R. 49, *Ram Kawal* v. *Ram Kishore*, I.L.R. 22 Calc. 500, *Churaman* v. *Gopi*, I.L.R. 37 Calc. 1, *Hurmanage* v. *Ram Gopal*, 17 C.W.N. 782, *Jayjiban* v. *Deo Shankar*, 1 Bor. 394 (436), *Kupoor* v. *Sebak*, 1 Bor. 405, *Chuni Lal* v. *Jussoo*, 1 Bor. 55 (60), *Gopalla* v. *Narayana* (1850) Mad. S.D.A. 74, *Rama* v. *Ranga*, I.L.R. 8 Mad. 552, *Lakshmi Narayana* v. *Durga*, I.L.R. 11 Mad. 288, *Tuppuluri* v. *Garimilla*, I.L.R. 34 Mad. 288, *Gudimella* v. *Bollazu*, 23 M.L.J. 223 and *Parma Bai* v. *Jai Narain*, I.L.R. 4 All. 482.

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There is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit. *Khub Lal* v. *Ajodhya*, 22 C.L.J. 345 (350).

It is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes, for it depends upon the circumstances of the disposition whenever such disposition is made and is to be consistent with the law regulating such disposition. *Cossinauth* v. *Horusundari*, 2 Morley's Digest, 119.

To support an alienation for worldly purposes, she must show necessity. In interpreting the term 'necessity,' the question of the extent of proof has often cropped up. It has been laid down that the best proof of necessity will be when the next reversioner consents to an alienation by the widow. He is the man most interested in the inheritance. If his assent has been obtained, there is a guarantee that the alienation is justifiable. This rule of evidence has led to the consideration of the question regarding the nature of the consent. It is now well established that the consent must have been given *bond fide*.

Great weight is to be attached to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was made under circumstances which rendered it lawful and valid. *Bijay Gopal* v. *Girindra*, 19 C.L.J 620 P.C., I.L.R. 41 Calc. 793. In that case the question was as to the validity of an ijara for 60 years by a Hindu widow, aged 42, with the consent of the then reversioners, and which was part of an arrangement or settlement in which all the branches of her husband's family shared.

The language of the decision of the Privy Council in *Hari Kishen* v. *Kashi Pershad*, 21 C.L.J. 225; I.L.R. 42 Calc. 876 P.C., L.R. 42 I.A. 46, seems to indicate that the consent by the next reversioner is something more than evidence of necessity, that it is an equity in favour of the alience. If so, their Lordships have gone a step further than in the case of *Bijay Gopal* v. *Girindra*, 1. L. R. 41 Calc. 793. In the former case, their Lordships held: "The requirement of the law as to valid and legal necessity may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions. But the mere attestation by a relative even though he might be sole contingent reversioner, does not necessarily import concurrence."

"When such a stringent equity as arises out of an alleged consent by the reversioners is sought to be enforced against them, such *consent* should not be inferred from ambiguous acts or be supported by dubious oral testimony, but, must be established by *positive evidence* that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests."

"The kindred in such case must generally mean all those who are likely to be interested in disputing the transaction, or at all events there should be

such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law."

A mortgage by a Hindu woman jointly with the next reversioner of a portion of inheritance, raises a presumption that it was entered into for legal necessity, but does not necessarily bind the reversionary interest. *Nabin* v. *Hem*, 19 C.W.N. 265.

The word 'necessity' should be given a liberal interpretation. A trade and its good will are valuable property and a Hindu widow is not bound to wind it up without regard to circumstances. As the very nature of the business requires borrowings for capital and owing to fluctuations in price results in the case of some of the transactions in the incurring of debts or redrafts, the incurring of such business liabilities by the widow is to be treated as debts of necessity binding on the reversioner *The South Indian Export Co. Ltd.* v. *Subbier*, 28 M.L.J. 696 (699).

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RAMCHANDRA MARTAND WAIKAR AND OTHERS
AND
VINAYAK VENKATESH KOTHEKAR AND ANOTHER

[Reported in L. R. 41 I.A. 290; I.L.R. 42 Calc. 384 P.C.; 20 C.L.J. 573 P.C.; 18 C.W.N. 1152 P.C.]

The facts of the case were as follows:

The suit was instituted by the appellants, three brothers, to recover possession of immovable property which they claimed as reversionary heirs, according to the Mitakshara law, of one Lakshman Rao. As appears from the pedigree set out in the judgment of their Lordships, the appellants, claiming through their mother Rangoobai, were sixth in descent (counting in the usual way, namely, including both first and last as a degree) from Timaji Pant, the grandfather of Lakshman Rao. The respondents (defendants) were the husband of Lakshman Rao's deceased daughter and their son.

It was admitted in the present appeal, though it had been otherwise contended by the respondents in India, that the family of Timaji Pant was governed by the Mitakshara law.

The judgment of their Lordships was delivered by

MR. AMEER ALI. The suit that has given rise to the present appeal was brought by the plaintiffs in the Court of the District Judge of Balaghat, in the Central Provinces of India, for possession of certain properties which originally belonged to one Lakshman Rao, whose next of kin or bandhus they claim to be under the law of the Mitakshara.

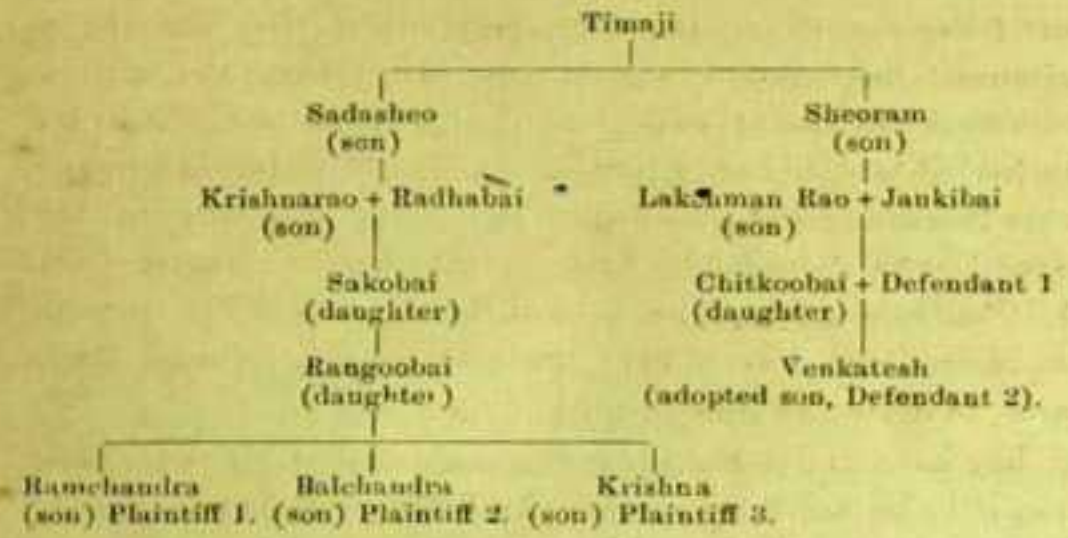
Lakshman Rao died in 1851, leaving him surviving his widow Jankibai and a daughter Chitkoobai, both since deceased. The defendant Venkatesh is Chitkoobai's husband. On Lakshman Rao's death without male issue his inheritance devolved on Jankibai. She held possession of the properties in suit as a Hindu widow until her death in 1883, when Chitkoobai

* *Present*: Lord Moulton, Lord Parker of Waddington, Sir John Edge, and Mr. Ameer Ali.

succeeded to her father's estate. She died on May 7, 1894, leaving the first defendant, her husband. The second defendant is a son adopted by him after Chitkoobai's decease.

The present action was not instituted until March, 1906. The plaintiffs claim that the inheritance to Lakshman Rao opened to them on the death of Chitkoobai, and that they are entitled to recover possession of the properties from the defendants who have no right of succession to Lakshman Rao's estate.

The following genealogical table will explain the relative position of the parties and the exact nature of the claim :—



The defendants resisted the claim mainly on two grounds ; they alleged, first, that the ancestors of the parties had migrated to the Central Provinces from Asirgarh, situated within the Mahratta country, where the law in force conferred on the daughter succeeding to her father's inheritance an absolute estate descendible to her own heirs ; that the family of Timaji was still subject to that law, and that accordingly the estate which Chtkoobai had acquired passed on her death without issue to the first defendant, her husband. In the second place, they urged that the plaintiffs had no heritable right or interest in Lakshman Rao's estate as they did not come within the category of bandhus entitled to succeed to his inheritance.

The Courts in India have overruled the first plea, and have held that on settling in the Central Provinces the family of

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Timaji adopted the lex loci and are now governed by the rules of the Mitakshara generally in force there.

But they have given effect to the defendants' second contention; they have held in substance that the Mitakshara lays down a well defined limit where the kinship entitling bandhus to succession ceases, and that the plaintiffs are beyond that limit. They have accordingly dismissed the suit.

The plaintiffs have appealed to His Majesty in Council, and the case has on both sides been argued with considerable ability and learning.

In dealing with the arguments addressed to this Board on behalf of the appellants their Lordships cannot help noticing one circumstance, namely, that in the Courts below, so far as appears from the record, it was not denied that there was a limit to the heritable right of bandhus, the only contention being whether it was seven degrees from the common ancestor or five as urged by the defendants. Before this Board, on the other hand, it has been strenuously contended that there is no limit to the succession of bandhus. Their Lordships do not wish, however, to draw any inference from this change of ground, for what they have to determine in this appeal is whether the term bandhu is to be construed as the plaintiffs argue in the broadest sense, or whether it is subject to any limitation, and in the latter case what that limitation is according to the law by which the parties are governed.

In the Hindu Law the succession of heirs individually specified does not present much difficulty; the controversies and divergences amongst Hindu lawyers are chiefly concerned with collateral succession. Mann, the ancient sage, whose identity is lost in the mist of ages, but whose word is regarded as divine, after giving the rules regarding the succession of lineal male descendants and male ascendants, declares: "The property of a near sapinda shall be that of a near sapinda."[1] Sir William Jones in his translation of Manu's Institutes has rendered the passage somewhat differently, but for the purposes of the present judgment this difference is of little importance.

[1] Chapter IX, v. 187. This is the translation given by Norris and Banerjee JJ. in *Babu Lal* v. *Nanku Ram*, I.L.R. 22 Calc. 339, at p. 346.

It is upon this enunciation that all the schools base the right of collaterals to succeed to the inheritance of a deceased person. This refers only to the succession of one male to another, for females inherit by express rules. The right of collaterals, therefore, is dependent on the existence of the sapinda-relationship between the propositus and the claimant. The contest that has arisen in the several schools is with regard to the meaning to be attached to the term sapinda, in other words, what does sapinda relationship imply, and what is the true test for determining whether a particular person is a sapinda to the deceased or not? Jimutavahana, the author of the Dayabhaga, the guiding authority in the Bengal or Gauriya school, considers it to mean "community in the offering of funeral oblations." He draws his argument from the word pinda, which literally signifies a ball of rice offered at the performance of obsequial rites. Mr. Lowndes is probably right, that in early times the right of inheritance was dependent on the right to participate in the offering of funeral oblations, a doctrine which is part and parcel of the Dayabhaga rules.

But it is also clear that Vijnaneswara, the author of the Mitakshara, who appears to have flourished towards the end of the eleventh and the beginning of the twelfth century of the Christian era, some five centuries before Jimutavahana, abandoned the ancient doctrine, and construed sapinda-relationship to arise from community of blood, or, to use the quaint language of Hindu writers, "community of particles of the same body." His legal conception in this respect will appear clearly from a passage of the Mitakshara, Book I., chapter on Marriage, not included in Mr. Colebrooke's translation. To this passage their Lordships will have to refer later on in the course of this judgment.

Messrs. West and Bühler in their Digest of the Hindu Law, the merit and authority of which has been recognized by eminent Hindu lawyers, have examined in detail the doctrines of the Mitakshara on this point, and their general conclusion as to Vijnaneswara's legal conception of sapinda-relationship is summed up in the following words, that he based it "not on the presentation of funeral oblations but on descent from a common ancestor, and in the case of females also on marriage

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with descendants from a common ancestor." Mr. Colebrooke in his rendering of the Mitakshara has paraphrased sapinda as a relation "connected by funeral oblation," which resulted in virtually obliterating one of the main distinctions between the Benares and the Bengal schools. But it is now recognized that his paraphrase was erroneous, and that the true theory of sapinda-relationship propounded by Vijnaneswara was based on community of blood. It is on this theory of Vijnaneswara that the learned counsel for the appellants place their chief reliance. The plaintiffs, it is urged, are unquestionably related to Lakshman Rao by tie of blood; they are, therefore, his sapindas, and consequently, in the absence of nearer kinsmen, entitled to his inheritance. It is to be remarked, as has been observed in previous cases before this Board, that the Hindu law contains its own principles of exposition, and that questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own lawgivers and recognized expounders.

The Mitakshara purports to be a commentary on the work of Yajnavalkya, who is supposed to have lived about the second century of the Christian era, about a thousand years before Vijnaneswara. In the Mitakshara he is spoken of in terms of deep veneration; and his doctrines, developed by Vijnaneswara, certainly shew a marked advance over the legal conceptions of his predecessors. So far as their Lordships have been able to ascertain, the bandhus, or distant kinsmen related to the deceased through females, make their appearance as heirs first in Yajnavalkya's enunciations. Mr. Borradaile, in the first volume of his reports of the Bombay Sudder Dewany Adalut decisions, has given a translation of the index to the Mitakshara, which furnishes a general idea of the scheme of this great and important work of Hindu Law. It consists of two books; the first called the Acharadhyayu "On Established Rules of Conduct or Ordinances," the second the Vyavaharadhyayu "On the Laws and Customs of the People." Both books, however, are so interrelated that the rules of the one can scarcely be construed without reference to the other.

It is to be noted that in the Vyavastha Chandrika the book on "Established Rules of Conduct" is cited as the Achara Adhyaya

("Chapter or Book on Established Rules of Conduct"), whilst in the decisions of the Indian Courts and recent works on Hindu Law it is referred to under the name of the Achara-kanda ("Division or Part relating to Established Rules of Conduct").

In the third chapter of the Achara-kanda Vijnaneswara lays down the rules relating to the forbidden degrees of kindred, and here he defines his theory of relationship. A translation of this passage is to be found in the Digest of Hindu Law, by West and Bühler,[1] and also in the judgment of the Bombay High Court in *Lallubhai Bapubhai* v. *Mankura bai*,[2] which came on appeal to Her Majesty in Council and was affirmed by this Board.[3]

That passage runs thus: "He should marry a girl who is non-sapinda (with himself). She is called his sapinda who has (particles of) the body (of some ancestor, etc.), in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda-relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into his (own). Just so is (the son a sapinda-relation), of his mother, because particles of his mother's body have entered (into his). Likewise (the grandson stands in sapinda-relationship) to his maternal grandfather and the rest through his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles, and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise does he stand in sapinda-relationship with paternal uncles and aunts, and the rest. So also the wife and the husband (are sapinda-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung from one body (*i.e.*, because they bring forth sons by their union with the offspring

[1] 3rd ed. (1884), Vol. I., p. 120. [2] I. L. R. 2 Bom. 388.
[3] L. R. 7 Ind. Ap. 212.

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of one person, and thus their husbands' father is the common bond which connects them). Therefore one ought to know that wherever the word sapinda is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

Then after refuting certain objections to his explanation of the word sapinda, Vijnaneswara proceeds thus[1]: "In the explanation of the word 'asapindâm' (non-sapinda, verse 52), it has been said that sapinda-relation arises from the circumstance that particles of one body have entered into (the bodies of the persons thus related) either immediately or through (transmission by) descent. But inasmuch as (this definition) would be too wide, since such a relationship exists in the eternal circle of births, in some manner or other, between all men, therefore the author (Yajnavalkya) says :—

"Verse 53: 'After the fifth ancestor on the mother's and after the seventh on the father's side.'—On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the sapinda-relationship ceases; these latter two words must be understood; and therefore the word sapinda, which on account of its (etymological) import (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word pankaja (which etymologically means "growing in the mud" and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are sapinda-relations."

The rendering of the above passages by Pandit Rajkumar Sarvadhikari, though apparently more free, is certainly instructive and interesting, and deserves quotation as shewing what a learned Hindu scholar considered was in the mind of Vijnaneswara when defining the word sapinda. "The Mitakshara then explains the following words in the next verse of Yajnavalkya, beyond the fifth and seventh degrees on the mother's side and the father's side respectively. It has been already explained, that the relation of sapinda exists by reason of the connection of

[1] West & Bühler, Vol. I, p. 121.

the parts of the same body, both directly and indirectly. But such a relationship is possible everywhere, in some way or other, between all men in this wide, wide world without a beginning. So the definition would be too wide. It is for this reason that the sage limits it thus, 'Beyond the fifth, etc.'

"The meaning is 'on the mother's side,' *i.e.*, in the line of the mother, after the fifth degree: 'on the father's side,' *i.e.*, in the line of the father, after the seventh degree, the relation of sapinda ceases.

"Although the word sapinda, therefore, may be applied in its etymological sense almost to all men it is, there can be no doubt, limited in its signification to certain definite individuals; just as the word mud-born is applied only to a lotus.

"Thus the father and the other ascendants are six sapindas and the son and the other descendants are six; and the man himself is the seventh. In case of the division of a line also, the enumeration should be made until the seventh degree, commencing from whence the direction of the line changes. This rule should be applied in every case."[1]

Their Lordships have no manner of doubt that in the passages quoted above Vijnaneswara was laying down rules for the limitation of sapinda-relationship generally.

It has been suggested in argument that this limitation is with regard to marriage only; that it defines the prohibited degrees within which a man cannot marry. A similar contention was put forward in *Lallubhai Bapubhai* v. *Mankuvarbai*.[2] The observations on this point of the learned judges, one of whom was the distinguished jurist West J. (co-author of the Digest, and afterwards Sir Raymond West), appear to their Lordships as extremely apposite to the present case.

Westropp C. J. in that case (at p. 426) said as follows: "it has been contended for the plaintiffs that in the above extracts from the Achara-kanda and the Sanskara Mayukha the respective authors were dealing with sapinda-relationship in its ceremonial aspect only, and that, when they wrote upon sapinda-relationship with reference to inheritance, they may be regarded as viewing

[1] Sarvadhikari's Tagore Law Lectures, 1880, pp. 603, 604.

[2] I. L. R. 2 Bom. 388.

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sapinda-relationship in the same light as the author of the Dayabhaga and certain other commentators on Hindu Law. But we think that the burden rests upon the plaintiffs to show that Vijnaneswara and Nilakantha regarded sapinda-relationship as resting on a different basis for the purpose of inheritance from that on which, dogmatically perhaps, but most distinctly, the one has placed it in the Achara-kanda and the other in the Sanskara Mayukha. We do not think that the learned counsel for the plaintiffs have given any good reason for assuming that the authors intended to make any such difference, nor is it likely that they did.

"The religious and ceremonial law of the Hindus as prevailing amongst castes, or in particular localities, is, generally speaking, almost inseparably blended with their law of succession in the same castes or localities, an opposite condition being exceptional."

As a matter of fact, as Messrs. West and Bühler point out, Vijnaneswara expressly says "wherever the word sapinda is used there exists (between the persons to whom it is applicable) a connection with one body either immediately or by descent."

In *Umaid Bahadur* v. *Udoi Chand* [1] the learned judges of the Full Bench (one of whom was a Hindu judge of great eminence) express themselves on this point in the following terms:—"Having taken great pains in accurately defining the word sapinda in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word sapinda is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent,' it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well understood rule of construction amongst the authors of the Institutes of Hindu Law, that the same word must be taken to have been used in one and the same sense throughout a work unless the contrary is expressly indicated."

Nor have the learned counsel for the appellants been in a position in this case to refer to any authority excepting one,

[1] I. L. R. 6 Calc. 119, at p. 126.

which their Lordships will notice later on, in support of their proposition that the limitations of Vijnaneswara on sapinda-relationship are confined to marriage, impurity, and exequial rites, and do not relate to inheritance.

The law of inheritance in the Mitakshara translated by Mr. Colebrooke occurs in book II, and forms chapter VI of that part of the work. It is entitled "dayuvibhagu," or "partition of heritage." It is unnecessary to refer to chapter I of Mr. Colebrooke's translation, or to the earlier sections of chapter II, as they deal with subjects which do not come within the purview of this judgment. It is with ss. V, VI, and VII. of chapter II that their Lordships are principally concerned. The rendering of the word sapinda as "relations connected by funeral oblations" runs throughout Mr. Colebrooke's translation. His arrangement of the matter is also different from the original where the subject of inheritance appears to be dealt with in a consecutive form in chapter VI.

Mr. Colebrooke has split it up into two chapters, divided into sections. (This circumstance is noticed in the Bombay judgment.) Chapter II, s. 5 (in Mr. Colebrooke's translation), deals with the succession of the gotraja, on failure of "brother's sons." Although gotraja is explained by the term gentiles borrowed from the Roman system, to which no doubt the Hindu system bears a remarkable analogy, it would be more convenient to adhere to the definition given in the Mitakshara itself. Omitting the English equivalents introduced into the translation, and retaining the Sanskrit expressions, the paragraphs run as follows:

"3. On failure of the paternal grandmother, gotraja-sapindas, namely, the paternal grandfather and the rest, inherit the estate. For bhinna-gotra sapindas are indicated by the term bandhu.

"4. Here, on failure of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles and their sons.

"5. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons and their issue, inherit. In this manner must be understood the succession of the samanagotra sapindas.

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"6. If there be none such, the succession devolves on samanodakas, and they must be understood to reach the seven degrees beyond sapindas, or else as far as the limit of knowledge and name extend." Accordingly, Vhrat Menu says, 'The relation of the sapindas ceases with the seventh person, and that of samanodakas extends to the fourteenth degree, or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra.'"

Their Lordships have preferred to adopt for the purposes of this judgment the translation which was before this Board in *Lallubhai's Case.* [1]

It is to be observed that the rule in paragraph 3 is thus stated in the Viramitrodaya [2]: "on failure of the paternal grandmother, the paternal grandfather and the other sapindas of the same gotra are heirs; since the sapindas (or persons connected through the pinda or body) of a different gotra are included under term the bandhu or 'cognates.'"

The earliest expounders appear sometimes to have used the term bandhu to signify a sapinda without any idea of including cognates. This is clear from a passage of the Viramitrodaya, where, after quoting the rule as to the succession of collaterals given by Vishnu, who places the bandhus immediately after brothers' sons, it says as follows [3]: "Here the term bandhu (kinsman) signifies a sapinda, and the term sakulya (distant kinsman) means a sagotra, or one descended from a common ancestor in the male line (other than a sapinda); if by the term bandhu the cognates of the father were comprised, then there would be a conflict with the order mentioned by Jogiswara, the Contemplative Saint, *i.e.*, Yajnavalkya. Yajnavalkya himself employs the expression indiscriminately in various places to signify connections and friends. But in chapter III of his Dharmasastram he distinctly introduces bandhus as acquirring a heritable right on failure of the gotraja. The passage in Rao Vishwanath Mandlik's translation [4] is as follows:—"The wife, daughters, both parents, brothers, and likewise their sons,

[1] I. L. R. 2 Bom. 388, at p. 431.
[2] Sastri Sarkar's Translation. (Calcutta, 1879), p. 199.
[3] Sastri Sarkar's Translation, p. 142.
[4] Mandlik's Hindu Law (Bombay, 1880), p. 220.

gotrajas (gentiles), bandhus (cognates), a pupil and a fellow-student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no putra (lineal male descendants)."

Learned counsel for the respondents urges that this inclusion of bandhus or cognates forms a marked extension of the right of inheritance to people who until then were not regarded as heirs, and he contends that it is hardly likely this remarkable change should have been made without any limitation, considering that the sapinda-relationship was subject to a limit.

To determine how far this contention is well founded, it is necessary to examine a little more closely the doctrines of the Mitakshara relating to the succession of collaterals. Vijnaneswara in reality seems to have shaped the rules which govern this branch of the law of inheritance in force in the Benares school. In s. 5 (3) (Colebrooke's Translation), in describing the gotraja-sapinda or consanguineous relations sprung from the same stock, he emphasizes the fact of their being members of the same family by the specific statement that the sapindas belonging to a different family (gotra)—the bhinna-gotra—are included under the designation of bandhus. This is clearly borne out by the passage of the Viramitrodaya already referred to. Henceforth the word bandhu, therefore, has, in the system of the Mitakshara, a distinctive and technical meaning, in other words it signifies the bhinna-gotra sapindas.

In paragraph 5 for the word gotraja-sapinda is substituted the more definite term of samana-gotra sapinda. With regard to this West and Bühler[1] observe that "The substitution of samana-gotra for gotraja, as well as the employment of bhinna-gotra to designate the opposite of the term, both show that Vijnaneswara took gotraja in the sense of 'belonging to the same family.'" Commenting on the passage relating to the succession of the gotraja sapinda, the Viramitrodaya, which is regarded as one of the most important commentaries on the Mitakshara, says "similarly to the seventh (degree) the sapindas of the same gotra take the estate of a person without male issue."[2]

[1] 3rd ed., Vol. I, p. 129.

[2] Sastri Sarkar's Translation, p. 199.

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This limitation of the seventh degree appears in Yajnavalkya's Institutes, chapter I, verses 52, 53, in these words [1]: "He who has not lost his chastity, let him marry a girl . . . . who is not a sapinda of him . . . . who is descended from one whose gotra and pravara are different from his, and who is removed five degrees on the mother's and seven on the father' side." The comment of Vijnaneswara on this text of Yajnavalkya has already been given in extenso in a previous part of this judgment, but the following lines may be quoted again with advantage: "On the mother's side in the mother's line after the fifth; on the father's side, in the father's line, after the seventh (ancestor) the sapinda-relationship ceases." [2]

The translation by Sastri Golapchandra Sarkar[3] of the passage in which these works occur is important, as he is the authority on whose expositions the appellants chiefly rely. It runs thus: "While explaining the term non-sapinda, the sapinda-relationship is stated to be directly or mediately through connection with one body, but that relationship of all persons may, in one way or other, be traced with all other persons in this world of eternal transmigrations of the soul with its minute body, and so it would include persons that are not intended to be included, hence it is ordained :—' and is beyond the fifth and seventh from the mother and from the father (respectively).' The purport is that sapinda-relationship ceases beyond the fifth from the mother, *i.e.*, in the mother's line and beyond the seventh from the father, *i.e.*, in the father's line."

It is quite clear, therefore, that the limitation of the seventh degree with regard to the samana-gotra sapindas given by Mitra Misra in the Viramitrodaya is taken from the rule enunciated by Vijnaneswara on Yajnavalkya in the Achara-kanda in respect of the cessation of sapinda-relationship.

Now, a bhinna-gotra sapinda is a bandhu according to Vijnaneswara. The classification contained in chapter II, s. 6 (Colebrooke's Translation), shows clearly who the bandhus are whom Vijnaneswara treats as bhinna-gotra sapindas entitled to

[1] Mandlik's Translation (Bombay, 1880), p. 167.

[2] West and Bühler, 3rd ed., Vol. I, p. 121; Mayne's Hindu Law (7th ed.), p. 691, par. 516.

[3] Hindu Law, p. 54.

succession on failure of the gotraja. The passage as translated by Mr. Colebrooke runs thus: "1. On failure of gentiles, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother; as is declared by the following text, 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.'

"2. Here, by reason of near affinity, the cognate kindred of the deceased himself are his successors in the first instance, on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Here Mr. Colebrooke renders the word grotraja into gentiles, and bandhus into cognates. He also paraphrases the three classes under which Vijnaneswara groups the technical bandhus, namely, the atma bandhus, the pitri bandhus, and the matri bandhus, as "cognates related to the person himself, to his father, or to his mother."

Their Lordships have little doubt, reading these passages by the light of the comments in the Viramitrodaya,[1] that Vijnaneswara was using the term bandhu in a restricted and technical sense, as implying a relation belonging to a different family but united by sapinda-relationship. In fact he expressly says so in chapter II, s. 5 (3).

It is not disputed that the plaintiffs do not come within the three categories mentioned above. But it is urged on the authority of *Giridhari Lall Roy* v. *Bengal Government*[2] that the enumeration is not exhaustive but merely illustrative.

In that case the question for decision was whether a maternal uncle not being specifically included in the enumeration

[1] Sastri Sarkar's Translation, p. 200.
[2] 12 Moo. Ind. Ap. 448.

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of bandhus in the Mitakshara was excluded from succession. Answering that question in the negative, and holding that although not expressly mentioned he was entitled to succeed as a bandhu, this Board observed that the text did not purport to be an exhaustive enumeration of all bandhus "who are capable of inheriting," nor was it cited as such for that purpose by the author; and that it was used simply as a proof or illustration of his proposition that there are three kinds or classes of bandhus. These remarks hardly warrant the contention, which is attempted to be based on them, that the classes specified by Vijnaneswara can be added to.

In the present case, however, it does not seem necessary to their Lordships to enter upon the determination of the question whether the classes can be extended, for the point at issue can be decided on other grounds.

The limitation of five degrees clearly applies, and can only apply, to the bhinna-gotra sapindas. But it is contended that this limitation is confined to prohibition in respect of marriage. As has already been observed, part of the limitation appears to have been applied to the succession of samanagotra sapindas; their Lordships are unable to see on what principle it can be said that the other part relative to kinsmen, who are equally sapindas but belong to a different gotra or gens, must be restricted to matrimonial affinity.

Considerable reliance has been placed on the statement of the law by Sastri Golapchandra Sarkar in his work on Hindu Law. Great respect is due to the opinions of that learned lawyer. But it seems to their Lordships that their weight is considerably discounted by his desire, in order to prevent the deceased's property becoming so to speak derelict and thus escheating to the Crown, to bring in the caste people of the deceased also as bandhus, and the somewhat uncertain note of his conclusion, where he says (at p. 73): "The conclusion, therefore, which appears to legitimately follow from the foregoing consideration, is, that the word bandhu in the Mitakshara means and includes either all cognate relations without any restriction, or at any rate, all cognates within seven degrees on both the father's as well as on the mother's side."

Again, his attempt to widen the signification of the word sapinda by employing the English equivalent of relation does not seem to be supported by the definition of sapinda-relationship in the Mitakshara itself.

Reference has also been made to certain passages in Rao Vishwanath Mandlik's valuable work, in which he says that the sapinda-relationship for inheritance is not always the same as for marriage or impurity (arising from birth or death). That may or may not be; but in one part of his work to which the Judicial Commissioner has referred in his judgment the learned translator of Yajnavalkya distinctly says that sapinda connection in general is "co-extensive with that for marriage purposes." Nor in this connection, their Lordships think, can the following passage in the Viramitrodaya be overlooked: "And the text, 'The sapinda-relationship, however, ceases in the seventh generation' is to be explained consistently with the text of Yajnavalkya, namely 'after the fifth and the seventh from the mother and the father (respectively)' to mean that it remains in the seventh but ceases in the eighth generation. Hence, as in the case of the unmarried females, the sapinda-relationship extending over three generations, as is declared in the chapter on impurity (occasioned by death, etc.,) is considered to be with reference to that alone; so it is to be deemed that this sapinda-relationship (extending to the fourth degree) is relative to succession alone."[1]

In the absence of any authoritative text their Lordships do not see their way merely on abstract reasoning to displace a view of the law which has received the recognition of the Courts in India, and which the District Judge, an officer of great experience and learning, says is accepted by "public opinion." As has already been observed, the right of inheritance is founded on sapinda-relationship, which, under the Mitakshara, means consanguinity, in a distinct legal sense clearly explained by the author. This bond comes to an end with the fifth degree when the descent is through a female. It seems difficult to conceive that the right to inherit should continue after the relationship on which it is founded, and which gives it birth, has come to an end.

[1] Sastri Sarkar's Translation, pp. 156 and 157.

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In the case of *Umaid Bahadur* v. *Udoi Chand* [1] one of the tests employed for determining whether the defendant in that case was a sapinda of the propositus was the mutuality of sapinda-relationship. "The doctrine of mutuality is based on the rule enunciated by Manu, and is fully explained by Rajkumar Sarvadhikari in his Lectures at p. 690. Another well known Hindu writer of the present day speaks thus of the above rule: 'It is to be observed here that the wealth of a sapinda is taken by his nearest sapinda, according to the well-known text of Manu. From that text it follows that the relation of sapindaship must be mutual. Among agnates the relation of sapindaship is always mutual; but among cognates it is not so in a few cases. In order to determine whether any persons are heritable cognates of the propositus 'it is necessary to see whether they are related as sapindas to each other': *Umaid Bahadur* v. *Udoi Chand*.[1] Unless sapindaship is mutual, one cannot be the heir of the other."[2]

In *Babu Lal* v. *Nanku Ram* [3] the rule of the Mitakshara enunciated in the Achara-kanda relative to sapinda-relationship in respect of marriage is assumed as applicable to inheritance. In fact the judgment proceeds on that basis; and the order of sapinda-relationship with its limitations in Rajkumar Sarvadhikari's Tagore Law Lectures is adopted as representing a correct exposition of the Mitakshara law. The doctrine of mutuality is also explained in clear terms: "Again, a sapinda of the propositus to be capable of inheriting must satisfy a further condition, namely, that he must be so related to the propositus, that the propositus is also a sapinda of him either directly or through the father or the mother. This mutuality of sapinda-relationship between the propositus and his heritable sapindas is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udoi Chand*,[1] and the authority for this is to be found in the text of Manu (chapter IX, 187) cited in the Mitakshara, chapter II, s. 3 (3), as interpreted by Balambhatta and Visweswara Bhutta, the two leading commentators on the Mitakshara.

[1] I. L. R. Calc. 119.
[2] Commentary on Hindu Law by J. N. Bhattacharyya, p. 459.
[3] I. L. R. 22 Calc.

The text according to these commentators means this, the property of a near sapinda shall be that of a near sapinda. From this it is clear that a man in order to be a heritable sapinda of the propositus must be so related to him that they are sapindas of each other."

These two decisions of the Calcutta High Court have been challenged on the ground that they represent Dayabhaga views rather than the doctrines of the Mitakshara. To their Lordships the objection seems hypothetical and without any basis excepting the criticisms of Golapchandra Sastri. One of the learned judges who decided *Babu Lal's Case*[1] was the distinguished judge and erudite Sanskrit scholar, Mr. Justice Gooroodas Banerjee, who was not likely to allow his mind to be confused by Dayabhaga conceptions in determining a case under the Mitakshara Law.

The general conclusion to which a close examination of the authorities leads their Lordships may be bri-fly stated as follows: (*a*) that the sapinda-relationship, on which the heritable right of collaterals is founded, ceases in the case of the bhinna-gotra sapinda with the fifth degree from the common ancestor; (*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are sapindas of each other, which is only a paraphrase of Manu's rule.

In the present case the plaintiffs are Lakshman Rao's paternal grandfather's son's son's daughter's daughter's sons. They are his bhinna-gotra beyond the fifth degree, and, as the District Judge points out, the element of mutuality is wanting between them and Lakhsman Rao.

Two considerations were strongly pressed on behalf of the appellants to induce their Lordships to extend the application of the sapinda-relation in the case of bandhus beyond the fifth degree mentioned in the Mitakshara. It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships understand

[1] I. L. R. 22 Calc. 339.

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exists in the Hindu system between the pupil and the guru who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood.

As regards the other consideration which is based on the possibility of the Crown becoming a claimant in the presence of remote bhinna-gotra, their Lordships need only observe that, whether such a claim would be justified or even be likely to be advanced, it does not seem necessary to express an opinion in the present case.

Here the defendant is in possession of Lakshman Rao's estate claiming as heir to his wife, Lakshman Rao's daughter. The plaintiffs' suit is an action in ejectment, and they must, in order to succeed, strictly prove their title.

It is a matter of satisfaction to their Lordships that they find themselves in complete agreement with the learned judges in the Courts below. The District Judge is himself a Hindu, versed in Sanskrit, and has examined the authorities in original. His decision is entitled to great weight and consideration.

Their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the costs of this appeal.

NOTE.—The leading case lays down two important limitations under which *bandhus* succeed to the property under the Mitakshara Law, *viz.*, one, that the 'sapindas' entitled to inherit are only those who come within the definition of that term in the Achara-kanda of the Mitakshara and the other "in order to entitle a man to succeed to the inheritance of another, he must be so related to the latter that they are Sapindas to each other." The first of these is well established. In *Umaid Bahadur* v. *Udoi Chand* (1880) I. L. R., 6 Calc. 119 and in *Babu Lal* v. *Nankuram* (1894) I. L. R. 22 Calc. 339 the second rule is considered to follow almost as a matter of course from Manu, Ch. IX, 187, as interpreted by Visvesvara and Balambhatta. Under the definition of sapinda, as given in the Achara-kanda, the number of male cognate sapindas will be 1150. By the application of the theory laid down in the case, the number of heritable bandhus will be reduced to 382. By the introduction of further limitation that if a person who is a bandhu through his mother is not a heritable bandhu, his son cannot be one either, though he is within seven degrees of the propositus, the number will be further reduced to about 230.

17.

HARI KISHEN BHAGAT

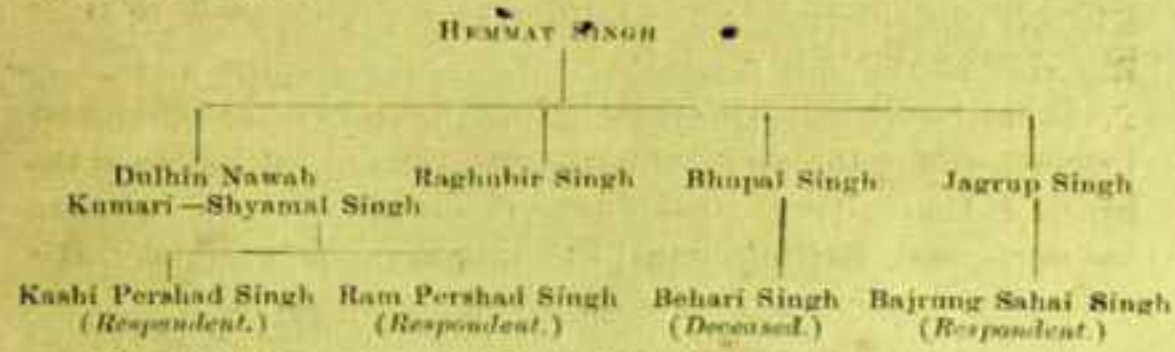
v.

KASHI PERSHAD SINGH.

[*Reported in I.L.R. 42 Calc. 876 P.C.; L.R. 42 I.A. 64; 21 C.L.J. 225 P.C.*]

P.C.*
1914
Oct. 27, 28;
Dec. 2.

The facts of the case were that Shyamal Singh was the owner of a four annas share of a mokurari tenure consisting of five mouzahs with kamat lands of the subject-matter of the two suits which gave rise to the appeal. He died in 1812 leaving Dulhin Nawab Kumari his widow and sole heiress who succeeded to his estate. The pedigree of his family so far as now material was as follows :—



On 26th November, 1877 Dulhin Nawab Kumari mortgaged 1, 2 and 3 of the properties in suit to Hari Kishen Bhagat for Rs. 950. The mortgage was witnessed by Raghubir Singh, who was at that time the sole reversionary heir of Shyamal Singh, and by Behari Singh, and was signed on behalf of the widow, the mortgagor, by the respondent Bajrung Sahai Singh.

On 11th July, 1882 the widow mortgaged 1, 4 and 5 of the properties in suit to Hari Kishen Bhagat to secure a further loan of Rs. 1,775. And on 10th July, 1889, she executed a zurpeshgi lease to Hari Kishen in respect of properties 2, 3, 4 and 5 of the properties in suit for eleven years in consideration of an advance of Rs. 1,250.

On 8th May, 1893 Hari Kishen Bhagat brought a suit on the mortgage of 26th November, 1877 against Dulhin Nawab Kumari, in which on 14th July, 1893 he obtained a decree under

* *Present*: Lord Dunedin, Lord Shaw, Sir John Edge and Mr. Ameer Ali.

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which he brought properties 1, 2 and 3 to sale and purchased them on 12th February, 1894 for Rs. 2,550; and on 19th February, 1897 he brought a similar suit on the mortgage of 11th July, 1882, obtained a decree on 23rd March, 1897, under which on 13th September, 1897 he brought to sale properties 4 and 5 and purchased them for Rs. 2,000. Both these suits were brought in the Court of the Subordinate Judge of Monghyr; they were both undefended, and none of the reversioners were parties to them.

Dulhin Nawab Kumari died in 1900; and on 14th and 16th December, 1904 respectively the present suits were filed the former by the respondent Bajrung Sahai Singh for a one-third share of the properties, and the latter by the respondents Kashi Pershad Singh and Ram Pershad Singh, sons of Raghubir Singh for a two-third share. The defendants in the former suit Hari Kishen Bhagat (the first appellant) and his two sons Kedaru Bhagat and Mahabir Bhagat, Kashi Pershad Singh, and Ram Pershad Singh as the persons claiming the other two-thirds of the properties; and the zemindar, Raja Ram Narain Singh, as the superior landlord: and the defendants in the latter suit were the appellants, Bajrung Sahai Singh, and the said zemindar.

The plaintiffs claimed as the reversionary heirs of Shyamal Singh on the death of Dulhin Nawab Kumari, and they alleged in their plaints that the mortgages and other transactions by her were not executed for legal necessity, and that the purchases by Hari Kishen Bhagat, therefore, conveyed to him only a life interest in the properties in suit which was determined on the widow's death.

The defence set up by Hari Kishen Singh in each case was that the loans and advances taken by the widow (the mortgagor) were for legal and valid necessities and that the transactions had been entered into by her with the knowledge, approval and consent of the then reversionary heirs of Shyamal Singh; he claimed therefore that he had acquired an absolute estate in the properties and that the money covered by the zurpeshgi lease was still due and unpaid.

The judgment of their Lordships was delivered by

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MR. AMEER ALI. The question for determination in these appeals relates to the validity, as against the reversioners, of certain sales held in execution of decrees obtained on mortgages effected by a Hindu widow, who had succeeded to her husband's estate on his death without leaving any issue. Shyamal Singh, the husband, died in 1842, and the widow, Dulhin Nawab Kumari, held the properties which form the subject of the present litigation until the transactions the validity of which is challenged in these suits.

The first morgage was executed by Nawab Kumari in favour of the defendant, appellant, on the 26th of November, 1877 in respect of three of the properties in her possession. On the 11th of July, 1882 she mortgaged the rest of the properties to Bhagat for a further loan, and in 1889 she gave him what is usually called in India a *ticca pottah* of the shares of Shyamal Singh in all the mouzahs save one. Under the usufructuary lease the defendant obtained possession of the shares convered by it.

In 1893 Bhagat brought a suit against Nawab Kumari on the mortgage of 1877 and in execution of the decree on that bond purchased the three properties to which it related. In 1897 he obtained a decree on the bond of 1882, in execution of which he himself purchased again the remaining properties held by the widow. He thus obtained possession of all the shares in the different villages which Nawab Kumari had inherited from her husband for a widow's estate.

Nawab Kumari died in 1900, and the plaintiffs, who are Shyamal Singh's brothers' sons, and whose reversionary right to his estate, though questioned in the first Court, is not disputed now, brought the present suits to recover possession of the properties held by Bhagat under the execution sales of 1893 and 1897, their main contention being that neither the mortgages executed by Nawab Kumari nor the sales thereunder affected more than her interest which ceased on her death.

Hari Kishen Bhagat is the principal defendant, but his sons have been impleaded in both actions, as they are joint in estate and leaving in commensality with him, and are, therefore, necessary parties.

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The main defence to the plantiffs' claims was that the mortgages were effected by the widow for valid and legal necessity under the Hindu Law, and, further, that they were concurred in by the reversioners, and that consequently the defendants by virtue of the sales in question acquired the interests of the widow as well as theirs. It is to be remarked that in neither of the mortgage suits were the reversioners made parties.

At the time when the bond of 1877 was executed the nearest reversioner to Shyamal Singh was his sole surviving brother, Raghubir Singh. After him stood Raghubir's sons, of whom there were several, and the sons of two other brothers, Bhupal and Jagrup, who were dead at the time. Among these nephews of Shyamal Singh the names of Behari, the only son of Bhupal, and of Bajrung Sahai, a son of Jagrup and a plaintiff in one of the present actions, should be particularly mentioned, as they figure in the transactions in question.

In the instrument of 1877 the name of the widow is written by Bajrung Sahai Singh. He also appears to have purchased the stamp paper on which the bond is inscribed. Among the witnesses to the document are Raghubir and Behari.

The name of the widow in the mortgage of 1882 appears to be written by Behari Singh, and one of the witnesses to this bond is Bajrung Sahai. On the lease of 1889 Nawab Kumari's name is written by Modenarain, a son of Raghubir, and the witnesses are Ram Pershad, another son of Raghubir, Bishan Pershad, one of the sons of Behari, and Bajrung Sahai, who also appears to have identified the lady to the Registrar. Both the Courts in India have found that so far as the *ticca pottah* of 1889 is concerned, the debt contracted thereunder has been satisfied out of the usufruct of the properties covered by the lease.

The points for determination in these appeals depend on the transactions of 1877 and 1882 respectively. The law relating to the dealings of a Hindu widow with her husband's estate which devolves on her in default of issue is now too well settled to need a prolonged consideration. To be valid as against the reversioners, or to affect their reversionary rights,

a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity, and the onus of establishing such necessity rests heavily on the person who claims the benefit or transactions with a Hindu widow or other females taking similar estates. The requirement of the law may, however, be fulfilled by proving the consent or concurrence of the reversioners to or in the transactions.

In the present cases the Trial Judge in a careful and well-considered judgment held that the defendants had failed to prove any valid and legal necessity for the mortgages executed by the widow. This view has been affirmed on appeal by the High Court of Calcutta, and there being thus a concurrent finding of fact by the two Courts in India, that subject is now out of the region of discussion. Both the Courts have further held in effect that the part taken by the reversioners with respect to the transactions in question did not amount to a consent to bind their interests. In view of the facts and circumstances of the case, their Lordships have no hesitation in expressing their concurrence with the conclusion at which the Courts in India have arrived. The Trial Judge has carefully examined the phraseology of the two instruments, and he is of opinion that their language is fully consistent with the fact that the interest of the widow alone was intended to be charged. Nor is there anything to show that the reversioners who helped her to raise the loans understood it otherwise. There is no evidence that they benefited from the transactions, or that so far as they were concerned there was any need for the mortgages. Their Lordships think that when a "stringent equity," to use Lord Hobhouse's expression in the course of the argument in *Jiwan Sing* v. *Misri Lall*[1] arising out of an alleged consent by the reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests; and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appears to have been relied upon in this case.

[1] (1895) I. L. R. 18 All. 146; L. R. 23 I. A. 1, 4.

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In *Raj Lukhee Debia* v. *Gokool Chunder Chowdhry*[1] this Board refused to affirm the proposition that mere attestation by a relative necessarily imports concurrence, and they added that when the consent of the husband's kindred is relied upon for the validity of alienations effected by the widow "the kindred in such case must generally mean all those who are likely to be interested in disputing the transaction. At all events there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu law." The observations of the Board in that case seem to their Lordships to apply with particular force to the facts of the present case.

On the whole, their Lordships are of opinion that the Judgments appealed from are right and ought to be affirmed, and that these appeals ought to be dismissed with costs. And they will humbly advise His Majesty accordingly.

Appeals dismissed.

NOTE.—Where a deed by a limited owner with qualified power of alienation is called in question, the question for consideration is, whether the purpose for which the alienation was made was proper or legitimate. In *Collector of Masulipatam* v. *Cavaly Vencata*, 8 Moo. I. A. 529 at p. 550, Turner L. J. said, "It is admitted on all hands and if there be collateral heirs of the husband, the widow cannot of her own will alien the property, *except for special purposes*. For religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband, she has a larger power of disposition than that which he possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand, it may be taken as established that an alienation by her, which would not otherwise be legitimate, may become so, if made with the consent of her husband's kindred. But it surely is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband or on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given, the purpose for which the alienation is made must be proper." Whether the particular purpose is proper or not must depend on the circumstances of the case; *but necessity is only one of the tests of propriety*. See *Raj Lukhee* v. *Gokool*, 13 Moo. I. A. 209, *Shamsundar* v. *Achhan Koer*, L. R. 25 I. A. 183; I. L. R. 21 All. 71 and *Bijoy Gopal* v. *Girindra Nath*, 19 C. L. J. 620 P. C.; I. L. R. 41 Calc. 793. In the last-mentioned case, it was held that the sanction by expectant reversioners of an alienation of property by a Hindu

[1] (1869) 13 Moo. I. A. 209, 228.

woman afforded evidence that the alienation was made under circumstances which rendered it lawful and valid. The same result would be attained, if the expression 'legal necessity' had not had impressed upon it a narrow sense and had not become generally associated with cases where there is actual pressure on the estate or danger thereto to be averted. *Upendra* v. *Bindeshri*, 22 C.L.J. 452 at pp. 474, 475.

Though mere attestation of deed does not necessarily import consent to alienation effected thereby nor even a knowledge of the contents thereof, a subsequent ratification has that effect. *Upendra* v. *Bindeshri*, 22 C.L.J. 452 at p. 479.

The validity of the family settlement is not affected by the circumstances that the grantor of a permanent lease was a limited owner in possession with qualified powers of alienation. *Upendra* v. *Bindeshri*, 22 C. L. J. 452.

See further the note on *Debi Prasad* v. *Golap Bhagat*, I. L. R. 40 Calc. 721 F.B.

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Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Mookerjee and Mr. Justice Holmwood.

MANIKYAMALA BOSE

v.

NANDA KUMAR BOSE.

[*Reported in I.L.R. 33 Calc. 1306; 4 C. L. J. 357; 11 C. W. N. 12.*]

1906 August 30.

Appeal by the defendants.

The facts of the case material to this report were these. Chandra Kumar Bose, brother of the plaintiff, died on the 9th Bhadra 1288 corresponding to the 24th August 1881 leaving his widow Manikyamala the first defendant and an adopted son Akhoy. He also left a will executed on the day of his death by which he made certain dispositions of his property and authorised his widow to take three sons successively in adoption, one after the death of another. Akhoy died on the 13th Magh 1299 corresponding to the 25th January 1893, after having attained his majority, leaving a childless widow Bidhumukhi, who died in Sraban 1305, corresponding to July 1898. Shortly afterwards, on the 14th Bhadra 1305 corresponding to the 29th August 1898, Manikyamala adopted the second defendant according to the rites prescribed by the Hindu Shastras.

The Judgments of the Court were as follows :—

MACLEAN C. J. I have had an opportunity of reading the judgment about to be delivered by Mr. Justice Mookerjee and I only desire to say that I entirely agree.

MOOKERJEE J. The facts which have given rise to the litigation, out of which the present appeal arises, are not disputed before us. One Chandra Kumar Bose, the brother of the plaintiff respondent Nanda Kumar Bose, died on the 24th August, 1881, leaving a widow, Manikyamala, the first defendant to this suit, and an adopted son Akhoy Kumar Bose. On the day of his death, Chandra Kumar executed a will by which he made a disposition of his properties and also authorised his widow to take three sons

successively in adoption, one after the death of another. Akhoy Kumar attained his majority, married and died on the 25th January, 1893, leaving a childless widow Bidhu Mukhi. Bidhu Mukhi died in July, 1898, and shortly after, on the 29th August, Manikyamala, the widow of Chandra Kumar, took the second defendant Mohendra Chandra in adoption, professing to act in exercise of the power conferred upon her by the will of her husband. The plaintiff commenced this action on the 8th June, 1904, for a declaration that the adoption is invalid under the Hindu Law. The learned Subordinate Judge has made a decree in favour of the plaintiff, declaring that the adoption of the second defendant by the first defendant is invalid. The defendants have appealed to this Court, and on their behalf the validity of the adoption has been sought to be maintained upon two grounds, namely, *first*, that upon a true construction of the will of Chandra Kumar, the adopted son took a mere life interest, followed by a gift over to the widow of Chandra Kumar upon failure of the male issue of the adopted son, and consequently, the widow could divest her own estate by a second adoption; and *secondly*, that as the adoption now in dispute was made after the death of the widow of the first adopted son, and at a time when the estate had reverted to the widow of Chandra Kumar, there was nothing under the Hindu Law to invalidate the second adoption.

The decision of the first question raised before us must depend upon the construction of the provisions of the will of Chandra Kumar. The first paragraph of the will authorises the widow to take three sons successively in adoption, one after the death of another. The second paragraph provides as follows :—

"My adopted son shall succeed to all the movable and immovable properties, which I have. On the death of one adopted son and until the adoption of another son by my wife, all my properties shall remain in the ownership and possession of my wife as my ordinary heir, and after my wife has adopted another son, the properties shall vest in him."

The third paragraph of the will provides for the management of the estate during the minority of the adopted son, and lays down that the estate is to be made over to him when he attained majority. The learned Vakil for the appellants contended that the adopted son took a life interest in the estate, and that upon his death the estate did not pass to his widow, but reverted to

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his adoptive mother. We are unable to accept this contention as well founded. Under section 82 of the Indian Succession Act, which was made applicable to Hindus by section 2 of the Hindu Wills Act, "where property is bequeathed to any person, he is entitled to the whole interest therein of the testator, unless it appears from the will that only a restricted interest was intended for him"; this is substantially the rule laid down by the Judicial Committee in *Jotindromohun Tagore* v. *Ganendromohun Tagore*, [1] where their Lordships observed that "if an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu Law (as under the present state of law, it does by will in England) an estate of inheritance." We feel no doubt that under the will of Chandra Kumar, his adopted son took an absolute interest, subject to a condition of defeasance. The question, therefore, arises, whether the executory gift over took effect in the present case. In view of section 111 of the Indian Succession Act, made applicable to Hindus by the Hindu Wills Act, 1870, and the decision of the Judicial Committee in *Norendra Nath Sircar* v. *Kamal Basini Dasi*, [2] we must hold, that the gift over did not take effect. Here a legacy is given to the widow of the testator, if a specified uncertain event, namely, the death of the adopted son of the testator, shall happen; no time is mentioned in the will for the occurrence of that event; the legacy cannot, therefore, take effect, unless the specified uncertain event, namely, the death of the adopted son, happens before the period when the fund bequeathed is payable or distributable. There was some discussion at the Bar as to the precise period when the fund bequeathed is payable or distributable in this case; it was suggested, on the one hand, that the period in question is the death of the testator as laid down by the Judicial Committee in *Norendra Nath Sircar* v. *Kamal Basini Dasi* [3]; it was argued, on the other hand, that the period of distribution is the time when the adopted son attains majority. It is immaterial for our present purposes which view is accepted, because the adopted son died, not only after the death of the testator, but

[1] (1872) L. R. 1. A. Sup. 47, 65; 18 W. R. 359, 365.

[2] (1896) I. L. R. 23 Calc. 563; L. R. 23 I. A. 18.

[3] (1896) I. L. R. 23 Calc. 563; L. R. 23 I. A. 18, 27.

also after he had attained majority. In either view, therefore, the gift over did not take effect. There is no foundation, therefore, for the suggestion made by the learned Vakil for the appellants, that the question raised before us is identical with the one left open by the Judicial Committee in *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*,[1] namely, the effect of a testamentary disposition by an adoptive father under which he restricts the interest of his adopted son in his estate to a life interest and limits it over to another adopted son of his own, if the first adopted son leaves no issue male or such issue male fails. We must hold, accordingly, that upon the death of Chandra Kumar his estate vested absolutely in Akhoy Kumar, that upon the death of the latter it vested in his widow Bidhu Mukhi, and that upon her death, it reverted to Manikyamala as the heiress of her adopted son.

The second ground taken before us raises a question of some nicety, which is not altogether free from difficulty. It is contended on behalf of the appellants, that, inasmuch as the second adoption was made after the death of the widow of the adopted son and at a time, when the estate was vested in the widow of the original owner, there was no bar to the second adoption as it would divest the estate of the adoptive mother alone. It has been conceded before us, and in view of the decision of the Judicial Committee in *Bhoobun Moyee* v. *Ram Kishore* [2] and *Padma Kumari Debi Chowdhrani* v. *Court of Wards* [3] it could not possibly be disputed, that the adoption would have been invalid, if it had been made during the life time of the widow of the adopted son, because during such period, the power of adoption was incapable of execution. The question, therefore, is reduced to this : Whether the power of adoption, vested in the widow of the original owner, which during the life time of her daughter-in-law was incapable of execution, became extinguished upon the death of her adopted son, when the estate vested in his widow or, whether such power of adoption merely remained in abeyance and was revived and became capable of execution upon the death of her daughter-in-law, when the estate reverted to her.

[1] (1865) 10 Moo. I. A. 279, 311 ; 3 W. R. P. C. 15.
[2] (1865) 14 Moo. I. A. 279 ; 3 W. R. P. C. 15.
[3] (1881) I. L. R. 8 Calc. 302 ; L. R. 8 I. A. 229.

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The solution of this question depends upon the principles deducible from a series of decisions of the Judicial Committee in which their Lordships had to consider the limits within which a power of adoption may be exercised by a Hindu widow.

The first case in which the question arose was that of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*.[1] One Gour Kishore died leaving a son Bhabani and widow Chandrabalee, to whom he gave express authority to adopt in the event of his son's death. Bhabani married, attained his majority and died leaving a widow, but no issue. Chandrabalee then adopted a son Ram Kishore, who sued Bhabani's widow Bhooban Moyee to recover the estate. The Judicial Committee held that her estate could not be divested by the subsequent adoption. Lord Kingsdown, in delivering the judgment, observed, that although the deed of permission did not, in express terms, assign any limits to the period within which the adoption might be made, it was plain that some limits must be assigned. It is incontestible that the judgment is founded upon the proposition of law, that a widow's power of adoption is limited. The question is what are the limits to be assigned; they are indicated in the following passage from the judgment:—

"It might well have been that Bhabani had left a son, natural born or adopted, and that such son had died, himself leaving a son, and that such son had attained his majority in the life time of Chandrabalee; it could hardly have been intended that after the lapse of several successive heirs, a son should be adopted to the great grandfather of the last taker, when all the spiritual purposes of a son, according to the largest construction of them, would have been satisfied. But whatever may have been the intention, would the law allow it to be effected? We rather understand the Judges below to have been of opinion, that if Bhabani Kishore had left a son, or if a son had been lawfully adopted to him by his wife under a power legally conferred upon her, the power of adoption given to Chandrabalee would have been *at an end*. But it is difficult to see what reasons could be assigned for such a result, which would not equally apply to the case before us."

[1] (1865) 10 Moo. I. A. 279; 3 W. R. P. C. 15.

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It is manifest from this passage that according to the Judicial Committee, when the son died leaving a widow, the power of adoption vested in the mother came to an end. No doubt in subsequent passages their Lordships observed that the adopted son had lived to an age which enabled him to perform all the religious services which a son could perform for a father, and, also, that the unlimited estate, which the son had taken, having vested in his widow, a new heir could not be substituted by adoption, so as to defeat that estate. These are, however, additional reasons in support of their Lordships' conclusion that the adoption was invalid and do not, in any way, weaken the effect of the reason first set forth. That this is the true view of the effect of the decision, is proved conclusively by the case of *Padma Kumari Debi Chowdhrani* v. *Court of Wards*,[1] which arose out of the same adoption. Ram Kishore got into possession of the properties left by Gour Kishore after the deaths of Bhuban Moyee and Chandrabalee. He was sued for its recovery by a distant relation of Gour Kishore, who would be entitled to succeed, if the adoption of Ram Kishore was invalid. The High Court held,—*Paddo Kumaree Debee* v. *Juggul Kishore Acharjee*,[2]—that the Judicial Committee had not decided that the adoption was invalid, but merely, that by the adoption of Ram Kishore, the estate vested in Bhuban Moyee was not divested, which was also the view adopted in the case of *Ram Soondur Singh* v. *Surbanee Dossee*.[3] The case then went before the Privy Council, and the Judicial Committee negatived this view of the effect of their previous decision (*Padma Kumari Debi Chowdhrani* v. *Court of Wards*).[4] Their Lordships pointed out that they considered previous decision to be, that upon the vesting of the estate in the widow of Bhabani, the *power of adoption was at an end and incapable of execution*. They further added that the vesting of estate in the widow, if not in Bhabani himself as the son and heir of his father, *was a proper limit to the exercise of the power*. This language is repeated and emphasised by their Lordships in

[1] (1881) I. L. R. 8 Calc. 302; L. R. 8 I. A. 229.

[2] (1879) I. L. R. 5 Calc. 615, 642, 643.

[3] (1874) 22 W. R. 121.

[4] (1881) I. L. R. 8 Calc. 302; L. R. 8 I. A. 229, 245.

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their judgment in *Thayammal* v. *Venkatarama*,[1] where it was stated that the survival of the son's widow and the vesting of the estate in her *put an end* to the right of his mother to adopt a son to his father. Their Lordships further expressed their entire concurrence in the view of the law laid down in *Padma Kumari Debi Chowdhrani* v. *Court of Wards*,[2] and with reference to the passage from that judgment already mentioned observed that "nothing can be clearer or more explicit than the language used by the Committee in that case." Substantially the same view was re-affirmed in *Tara Churn Chatterji* v. *Suresh Chunder Mukerji*.[3] In view of these decisions of the Judicial Committee, it is impossible for us to uphold the contention of the appellants, that their Lordships intended merely to decide that the power of adoption vested in the mother did not come to an end, but remained suspended during the life time of the widow left by the son. The effect of the decision of the Judicial Committee was considered by the Bombay High Court in *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* [4] and we agree in the view taken by the learned Judges, who decided that case, the facts of which were very similar to those of the case before us. The question was further considered by a Full Bench of the Bombay High Court in *Ram Krishna* v. *Shamrao*,[5] in which Mr. Justice Chandavarkar, after an elaborate review of the authorities, observed that the language of the judgment in *Bhoobun Moyee's* case [6] is so explicit that it is impossible to construe it otherwise than as meaning that there is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached the power is at an end. The learned Judge expressed his concurrence with the view of Sir Charles Sargent in *Hasabnis's* case [4] that the language of the Privy Council is altogether inconsistent with any idea of the right to adopt being merely suspended during the widow's life time, and concluded that, where a Hindu dies leaving a widow and a son and that son dies leaving a widow, the power of adoption vested in the former widow was extinguished and could never

[1] (1887) I. L. R. 10 Mad. 306; L. R. 14 I. A. 67, 70.
[2] (1881) I. L. R. 8 Calc. 302; L. R. 8 I. A. 229.
[3] (1889) I. L. R. 17 Calc. 122; L. R. 16 I. A. 166.
[4] (1892) I. L. R. 17 Bom. 164.
[5] (1902) I. L. R. 26 Bom. 526.
[6] (1865) 10 Moo. I. A. 279; 3 W. R. P. C. 15.

afterwards be revived. The same view is indicated in the judgment of Mr. Ranade in *Venkappa Bapu* v. *Jivaj Krishna*,[1] where that learned Judge observed, that a widow succeeding as heir to her son, is competent to adopt only when that son has left neither widow nor issue. Upon a review, then, of the authorities, we must overrule the contention of the appellants, that the widow's death is the limit of time within which and the failure of male issue in the male line and the vesting of the estate in the widow are the only two conditions subject to which the power may be exercised, no matter whether the estate vests in the adopting widow just after the death of the son or after the death of the widow of the son.

The learned Vakil for the appellants placed considerable reliance upon the decisions of this Court in the cases of *Bykant Monee Roy* v. *Kisto Soonderee Roy*[2] and *Manik Chand Golecha* v. *Jagat Settani Pran Kumari Bibi*[3] and upon the decision of the Judicial Committee in *Kannepali Suryanarayana* v. *Pucha Venkataramana*.[4] In the first of these cases an adoption made under circumstances very similar to those of the present case was upheld by this Court. It does not appear to have been argued whether the fact that the adoptive mother made the adoption after the death of her daughter-in-law distinguished the case from that of *Bhoobun Moyee* v. *Ram Kishore*.[5] But it appears to have been assumed that all that the Judicial Committee intended to decide was that the widow was competent to adopt, if she divested the estate of no one but herself. That this was the prevailing view of the effect of the decision of the Judicial Committee is made clear by the cases of *Ram Soondur* v. *Surbanee*[6] and *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee*.[7] That the view is erroneous we now know from the decision of the Judicial Committee in *Padma Kumari* v. *Court of Wards*.[8] It follows accordingly that the decision in *Bykant Monee Roy* v. *Kisto Soonderee*

[1] (1900) I. L. R. 25 Bom. 306, 310.
[2] (1867) 7 W. R. 392.
[3] (1889) I. L. R. 17 Calc. 518.
[4] (1906) 10 C. W. N. 921; 4 C. L. J. 171; since reported, I. L. R. 29 Mad. 382.
[5] (1865) 10 Moo. I. A. 279; 3 W. R. P. C. 15.
[6] (1874) 22 W. R. 121.
[7] (1879) I. L. R. 5 Calc. 615.
[8] (1881) I. L. R. 8 Calc. 302; L. R. 8 I. A. 229.

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Roy[1] is inconsistent with the decisions of the Judicial Committee in *Padma Kumari* v. *Court of Wards*[2] and *Thayammal* v. *Venkatarama*[3] and is therefore not binding on this Court. As regards the case of *Manik Chand* v. *Jagat Settani*,[4] no doubt there are certain observations in the judgment, which may tend to lend some apparent support to the contention of the appellants; but the learned Judges seem to have recognised that according to the decision of the Judicial Committee in *Padma Kumari* v. *Court of Wards*[2] the power of adoption *is at an end* and incapable of execution when the estate vests in the widow of the son, and they held this principle to be inapplicable to the case before them (which was that of a Jain widow) on the ground that no power from the husband was necessary to the validity of the adoption. As regards the recent decision of the Judicial Committee in *Kannepalli Suryanarayana* v. *Pucha Venkataramana*[5] it does not touch the question before us. It is argued, however, that it has the effect of considerably weakening, if not actually overruling the earlier decision of their Lordships in *Bhoobun Moyee* v. *Ram Kishore*.[6] No doubt their Lordships quote with approval a passage from the judgment of Mr. Justice Mitter in *Ram Soondur Singh* v. *Surbanee Dossee*,[7] in which that learned Judge had held that an adopted son, attaining an age of sufficient maturity and by performing the religious services enjoined by the Shastras, cannot exhaust the whole of the spiritual benefit, which a son is capable of conferring upon the soul of his deceased father. This, no doubt, militates against the view taken in the case of *Bhoobun Moyee* v. *Ram Kishore*,[6] to which their Lordships' attention does not appear to have been invited, namely, the view that all the spiritual purposes of a son may, under certain circumstances, be taken to have been satisfied. But their Lordships do not dissent from the view that when the adopted son dies leaving a widow, the power of adoption given to the mother comes to an end. That their Lordships could not have intended to dissent from or throw

[1] (1867) 7 W. R. 392.
[2] (1881) I. L. R. 8 Calc. 302; L. R. 8 I. A. 229.
[3] (1887) I. L. R. 10 Mad. 205; L. R. 14 I. A. 67.
[4] (1887) I. L. R. 17 Calc. 518.
[5] (1906) 10 C. W. N. 921; 4 C. L. J. 171; I. L. R. 29 Mad. 382.
[6] (1865) 10 Moo. I. A. 279; 3 W. R. P. C. 15.
[7] (1874) 22 W. R. 121.

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any doubt upon this view is reasonably clear from the circumstance that they do not make any reference to the earlier portion of the judgment of Mr. Justice Mitter in *Rao Sooraj Singh* v. *Surbanee Dossee*,[1] in which that learned Judge had put a limited construction upon the decision of the Judicial Committee in *Bhoobun Moyee* v. *Ram Kishore*,[2] which limited construction was expressly disapproved by their Lordships in *Padma Kumari* v. *Court of Wards*.[3] We must further remember that the immediate question before the Judicial Committee in *Kannepalli* v. *Pucha*[4] was whether upon the death of the first adopted son, when little more than two years of age, it was competent to the widow to take a second boy in adoption; it was held that the authority to adopt was not exhausted by the first adoption, which view does not in any way conflict with the rule laid down in any of the earlier cases before the Judicial Committee. On the other hand, the case of *Velfouki Venkata Krishna Rao* v. *Venkata Rama Lakshmi*[5] shows that an adoption of a son after the death of one son is valid.

On these grounds, we must hold that the adoption of the second defendant by the first defendant after she had succeeded as heir to her first adopted son after his death and that of his widow, is invalid.

It has been conceded before us that their is nothing in the original texts of the Hindu Law, which deals with the question raised before us or touches the matter directly. But it was much pressed upon us that the principle laid down by the Judicial Committee does not accord with the spirit of the Hindu Law, as expounded in the books or understood by the Hindus themselves. It is not open to us, however, to go into that question, as we are bound by the law as laid down in *Bhoobun Moyee's* case,[2] and as expounded and re-affirmed in the later decisions of the Judicial Committee. The appeal consequently fails and must be dismissed with costs.

HOLLWOOD J. I entirely agree.

Appeal dismissed.

[1] (1874) 22 W. R. 121.

[2] (1865) 10 Moo. I. A. 279; 3 W. R. P. C. 15.

[3] (1884) I. L. R. 8 Calc. 302; L. R. 8 I. A. 229.

[4] (1866) 10 C. W. S. 921; 4 C. L. J. 171; 3 I. L. R. 2 Mad. 282.

[5] (1876) I. L. R. 1 Mad. 174; L. R. 4 I. A. 1.

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NOTE.—There is a limit to the period within which a widow can exercise her power of adoption, and that once that limit is reached that power is at an end. This power absolutely comes to an end when once the estate has vested in the heir of her deceased son and is not revived even if she afterwards succeeds to the estate. The consent of the son's heir in whom the estate had vested, does not validate the adoption. *Adivi Suryanarayana* v. *Nidamarty*, I. L. R. 33 Mad. 228. See also the *obiter dictum* of Jenkins C. J. in *Anandibai* v. *Kashibai*, I. L. R. 28 Bom. 461 at p. 465; 6 Bom. L. R. 464.

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Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Chitty and Mr. Justice Chatterjee.

BHUPATI NATH SMRITITIRTHA

v.

RAM LAL MAITRA.*

[Reported in I. L. R. 37 Calc. 428 F. B.; 10 C. L. J. 553 F. B.; 14 C. W. N. 18 F. B.].

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The facts of the case were as follows :—

Umesh Chandra Lahiri died on the 28th of June, 1890, having made his last will on the 26th June, 1890. He left him surviving his widow Braja Kumaree, his mother Anandamayee, a sister Iswaroha and a cousin sister Bhogabatee. They are now dead. Braja Kumaree died on the 27th of January, 1894. Her husband had, by his will, given her authority to adopt three sons in succession, one in default of the other, but she did not exercise her authority. The seventh defendant, Hem Chandra Lahiri, is the testator's heir-at-law, if the true construction of his will leads to a conclusion of intestacy after the widow's and mother's death. The plaintiffs are the sons of the testator's *guru* (spiritual preceptor) Harinath Bhattacharyya, who died either in December, 1892, or January, 1893, *i.e.*, about a year before the widow's death.

One of the provisions made by the testator in this will was that, if at the death of his widow no son or adopted son existed capable of taking his property, the executors named in his will would establish an image of the goddess Kalee in the name of his mother Anandamayee and the surplus income left after the worships of the family deities, Iswar Gopal Deb, Saligram Narain and Iswar Mahadev, should be devoted to the worship of the goddess to be called Anandamayee Kalee. In accordance with this direction, the executors established and consecrated in the month of October or November, 1894, an image of the goddess made of earth, and later on, in the year 1895, replaced the image by one made of stone and had a temple built for its location. They thus carried out the directions in the will, and the worship has ever since been duly carried on.

The testator, however, added a direction in his will that "if, for any reason, the image of Iswar Kalee Devi is not established and if the income of my properties is not used for her *sheba* and worship, then my grandson and his sons, grandsons, etc., in succession shall get my Rangpur properties and possess the same, in absolute right from generation to generation with right to sell or make a gift thereof." A similar provision was made with respect to some other properties in favour of the testator's purohit (priest).

* Reference to Full Bench in appeal from Original Decree, No. 25 of 1899.

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The present suit was instituted by the sons of the *guru* on the 4th July, 1904, for a construction of the testor's will, for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void, for possession of the Rangpur properties and for an account and mesne profits. Some of the defendants are the surviving executors and trustees. The defendant Sarat Chandra Maitra was entitled to an annuity under the will. Hem Chandra Lahiri and the legal representatives of some of the deceased executors and trustees are also parties to the suit. The suit was defended by the surviving executors and trustees.

The judgments of the Court were as follows :

JENKINS C. J. The questions referred for our determination are :—

(*i*) Does the principle of Hindu Law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hemchandra Boral*[1], *Rajomoyee Dassee* v. *Troylukho Mohiney Dassee*[2], and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb*[3], have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in these terms :—

"(*Ka*) All my properties shall be placed in the hands of Babu Ram Lal Maitra, son of late Ram Chandra Maitra of Haripur, and the grandsons of my father-in-law, Sriman Kali Prasanna Maitra, Sriman Chandra Maitra, Sriman Pratap Chandra Maitra, Sriman Abhay Govinda Maitra, etc., as trustees. They shall according to the provisions made in para. 4 pay to the persons mentioned in that para., their monthly allowances, as fixed by me : and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father's sister's daughter) : and shall pay to my *gurudev* Srijukta Harinath Bhattacharyya of village Purbasthali in the district of Burdwan Rs. 10 as *barshik* and to my *purohit* Srijukta Srish Chandra Chakrabarty of

1 (1897) I. L. R. 25 Calc. 405. 2 (1901) I. L. R. 29 Calc. 289.
3 (1902) I. L. R. 30 Calc. 521.

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Salkeah Re. 5 as *barshik*, and after defraying the expenses for the *sheba* and worship, during my turn of the ancestral *ijmali bighraha*, Iswar Gopal Dev Thakur, Saligram Narain and Iswar Mahadev Thakur, they shall spend the surplus income which may be left in the *sheba* and worship of Kalee after the name of my mother, *i.e.*, in the name of Iswar Anandamoyee Kalee. The image of the deity shall be established and consecrated at my dwelling-house or at Kashee, and in case any of the persons mentioned in para. 4 dies, then the allowance which I have fixed for him or her, during his or her lifetime, shall, after his or her death, be spent for the worship of the said Iswar Anandamoyee Kalee.

"(*Kha*) If the said Ram Lal Maitra or any of the grandsons of my father-in-law dies, his heirs shall be appointed in his place, in order of seniority and act according to the provisions made in para. (*ka*) and hold the estate as trustees. If any of these heirs be a minor, his lawful guardian shall hold the estate during his minority, and when he will have attained his majority then the estate shall pass into his hands as a trustee."

The will then goes on to provide that if for any reason the image of Iswar Kalee Debee is not established and if the income of the testator's properties is not used for her *sheba* and worship, then the testator's *gumasta* and his sons, grandsons, etc., in succession should get his Rangpur properties and possess the same in absolute right from generation to generation.

The facts as found by the referring Bench are briefly these: Umesh Chandra Lahiri died on the 28th June 1890, and in the events which have happened Hem Chandra Lahiri became and now is his heir-at-law. It was not until 1894 either in the month of October or November, that the executors for the first time established and consecrated an image of the Kalee. The image so established was in the first instance of earth, but in 1899 it was replaced by one of stone and a temple was built for its location. The worship has ever since been duly carried on as provided in the will. All we have to consider is whether the fact that the image was established and consecrated for the first time after the testator's death invalidates the provision in the will.

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It is necessary to observe the precise character of this provision. It does not purport to be a simple gift of property to an image to be consecrated as was to some extent the basis of the appellant's argument before us; but the testator directed all his property to be placed in the hands of persons named by him and subject to certain payments these persons were directed to spend the surplus income which might be left in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother. Now this manifestly was a disposition for religious purposes and such dispositions are favoured by Hindu Law. Thus it is said by Katyayana: "If a gift be promised by a person whether in health or sickness for a religious purpose, and he dies without making it, his son should be compelled to make it: Of this there is no doubt" (see Mandlik's Hindu Law, page 124). Again in the Chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to any body for religious purposes should be given to him without fail": see Mitakshara, Vyavahara Adhyay, Part III, Chapter IV, section 11 (translated by the late Girish Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because *Dharma* is the then master or owner of such property. Let the owner himself or his representative, O Goddess! appropriate to pious purposes the corpus of a property or its income according as it may have been resolved": Mahanirvana Tantra, section 12, vv. 92—94. Other texts might be cited in support of this view, but it is unnecessary to elaborate this point.

And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charirable purposes are favoured: the leaning of the Courts too is in the same direction. Thus in the *Mayor of Lyons* v. *E. I. Co.*[1], it was said "Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in

[1] (1836) 1 Moo. I. A. 175.

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this country; but in one respect there is sufficient authority, viz., as far as regards a postponement of distribution and the not declaring the gift void on account of any present difficulty in giving it effect: the case of *A.-G.* v. *Bishop of Chester*[1] furnishes a direct authority for not declaring a legacy void, because it was for an object which could not at the time be accomplished and for retaining the fund in Court until it should be possible to apply it."

Now, had the direction in the testator's will simply been that the surplus income should be spent "in the *sheba* and worship of Kalee," it would, I think, clearly have been good, for the purpose would have been religious and the direction would not have been bad for uncertainty.

On the question of uncertainty we may look for assistance to the English decisions [*Ramchandra Vandrawandas* v. *Parmanand Bai*[2]], and in England it has been held that gifts "for the worship of God" or "to be employed in the service of my Lord and Master" are good: [*A.-G.* v. *Pearce*[3], *Powerscourt* v. *Powerscourt*[4], and *Re Barling*[5]]. Then does it invalidate the disposition that the discretion is for the spending of the surplus income in the *sheba* and worship of the Kalee "after establishing the image of the Kalee after the name of my mother?" I think not: the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected: see *Mills* v. *Farmer*[6]. And the decision in *Ramlanee Mullick* v. *Ram Gopaul Mullick*[7] shows that the pious purpose does not fail merely because the testator directs as a means of carrying it into effect, that something should be done after his death: [see too *Mayor of Lyons* v. *E. I. Co.*[8] and *Ramchandra Sivadas* v. *Vinayek Bin Ramchandra*[9]]. But then it is urged that the decision in *Ezendra Lal Bural* v. *Hem Chandra Bural*[10] is against the validity of the disposition now under consideration. There, apparently,

[1] (1785) 1 Bro. Ch. 444; 28 E. R. 1279.
[2] (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71.
[3] (1817) 3 Mer. 353.
[4] (1854) 1 Mol. 616.
[5] (1906) 1 Ch. 50.
[6] (1815) 19 Ves. Jun. 483, 486.
[7] (1829) 1 Knapp 253.
[8] (1830) 1 Moo. I. A. 175.
[9] (1878) I. L. R. 7 Bom. 37, 41.
[10] (1907) I. L. R. 25 Calc. 405.

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power was given by a testator to his wife to establish the service of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the *sheba*.

In relation to those dispositions it was said, "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place, it is this decision that has principally led to the present reference, so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the learned Judges did not consider the aspect of the case which I have been discussing, but treated the disposition with which they were concerned, as though it were a simple gift to a non-existent idol.

I have shown that the disposition with which we have to deal in this case is something different from that.

But apart from that I think we should not regard the decision in *Upendra Lal Joral's case*[1], as affording any sufficient reason for holding the direction now under consideration as invalid.

That decision purports to rest on the authority of *Bai Motivahu* v. *Bai Mamubai*[2] where their Lordships after referring to the *Tagore case*[3] say, "Two rules applicable to the will now under consideration are laid down in the judgment of the Committee": one is "that a person capable of taking under a will must be such a person as would take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator," page 70 * * * * And it is said (page 69): "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are generally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

Now, turning to the *Tagore case*[3], we find that the rule against a gift to a person not in existence and capable of taking from the donor at the time when the gift is to take

[1] (1897) I. L. R. 25 Calc. 405.
[2] (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.
[3] (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

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effect, rests on the principle expressed in Dayabhaga, Chapter I, ver. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

This passage in the Dayabhaga is used to illustrate the proposition that the "right of one may consistently arise from the act of another," and it is there pointed out in proof of this that in the case of donation the donee's right to the thing arises from the act of the giver; *namely, from his relinquishment in favour of the donee who is a sentient person.*

The Privy Council evidently considered the later of these two cases was governed by the earlier, notwithstanding that to the one the Mitakshara and to the other the Dayabhaga applied, and that in relation to the question involved in the text cited the contentions of the two schools are not in complete harmony. So it is immaterial that the referring Bench does not state which school of law applies in the circumstances of this case. It is, no doubt, true that an idol has been frequently described as a juridical person and even as owning property [*Shibessouree Debia's case*[1]], but it has since been explained that it is only in an ideal sense property can be said to belong to an idol: [*Prasanna Kumari Debia's case*[2] and *Jogadindra Nath Roy's case*[3]]. Whether this ideal sense means more than that the dedication to a deity is a compendious expression of the pious purposes for which the dedication is designed, may be a question.

In favour of this view we have the doctrine of Medhatithi cited to us in the course of the argument that the primary meaning of property and ownership is not applicable to God, and the train of reasoning that is suggested by the teaching of the Aditya Purana that the Gods cease to reside in images which are mutilated, broken, burnt, and so forth. (Saraswati's Hindu Law of Endowment, page 129).

But whatever may be the true view on this obscure and complex question, this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious

[1] (1869) 13 M. I. A. 270.
[2] (1875) 14 B. L. R. 400; L. R. 2 I. A. 145, 162.
[3] (1894) I. L. R. 22 Calc. 128; L. R. 21 I. A. 230.

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purpose, though that purpose cannot in strictness be called a sentient person: [*Rowlonoo Mullick's case*[1]]. It would seem that the rule propounded by Jimutavahana had regard rather to the general proposition for which he was contending, *i.e.*, that the act of the giver is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property must be kept within its proper limits, and were we to accede to the argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hinderance and not for the furtherance of justice.

In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquishment in favour of the donee who is a sentient person," does not apply to the direction contained in the testator's will that the persons indicated by him shall spend the surplus income in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view they have not been correctly decided.

STEPHEN J. In this case I have had the advantage of reading the judgments of my colleagues before writing my own. I agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case I wish to explain briefly how the matter presents itself to me, relying on my brothers Mookerjee and Chatterjee for the contents of Hindu texts, which are of prime importance in the decision of the question before us.

There is no doubt, in the first place, that dedication by a Hindu of the property to a deity is not only lawful, but commendable in a high degree. But the question arises what is the legal effect of such a dedication. A gift consists of two parts, abandonment of rights over the subject-matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law, but there can be no

[1] (1829) 1 Knapp 245.

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acceptance by the deity. Why this should be so may be a matter that we need not enquire into; but the fact appears to me to be explained by two self-evident propositions, namely, that it is a contradiction in terms, to talk of the Creator accepting anything, in the legal sense of the word, from a creature, and that it is inconceivable that laws which were made for, if not by, men should be applicable to a deity. But though a dedication to a deity does not constitute a gift, it has a legal effect. The intention of the donor is that the subject-matter of the gift shall be used for doing honour to the deity by worship and for conferring benefit on the worshippers and the ministers of the deity who conduct it. This worship is properly and, I understand, necessarily carried out by having recourse to an image or other physical object; but the image is nothing till inspired by the deity. It is the duty of the Sovereign to see that the purposes of the dedication are carried out.

On, and consistently with, this basis of general principles, modern law has arrived at certain conclusions. Of these the most important, for present purposes, is that an idol after it has been duly constituted is a juridical person in an ideal sense. The practical meaning of this somewhat elusive expression is that the ministers of an idol have over the property dedicated to the idol, which is the same thing as the deity inspiring the idol, the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf, being at the same time liable to corresponding duties legally enforceable. This seems to me to show that such a dedication as the present is a devise for a religious purpose, such as, on the authorities referred to by my learned brothers, would be recognised as valid by English law, and not considered as bad for uncertainty.

The above considerations leave no room in the case of a dedication to a deity for the application of the rule as to the invalidity of gifts other than to sentient being laid down in the *Tagore case*,[1] and it follows that the present case and the subsequent cases quoted in the reference before us must be held to have been wrongly decided.

[1] (1872) 9 B. L. R. 377.

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to be valid must be in favour of a sentient person in existence and capable of taking from the donor at the time when the gift is to take effect. I shall assume this was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that, by a fiction of law, an idol is a juridical person, and in support of this view reliance is placed upon the cases of *Shibessouree Debia* v. *Mothooranath Acharyo*[1] and *Prosunno Kumari Debia* v. *Golap Chand Baboo*.[2] The later decision of the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*,[3] however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities, as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

The passage in the Dayabhaga, which is supposed to go to the root of the matter, is as follows:

दृष्टं च लोकेऽपि दाने हि चेतनोद्देशविशिष्टस्यागादेव दातव्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वम्। (Bharat Shiromani's Edition, 1863, page 25).

This is translated by Colebrooke as follows: "That is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, *viz.*, from his relinquishment in favour of the donee who is a sentient person." (Chapter I, para. 21)

In the very next passage Jimutavahana proceeds as follows:

परस्वत्वापत्तिफलेन हि दानक्रियता, तच्च फलं सम्प्रदानाधीनम्। (Page 27).

[1] (1869) 13 Moo. I.A. 270.

[2] (1875) 14 B. L. R. 450; 23 W. R. 253; L. R. 2 I. A. 145.

[3] (1904) I. L. R. 32 Calc. 129; L. R. 31 I. A. 203.

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as can take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the time of death of the testator. It has been assumed that this rule is applicable to a bequest to trustees for the establishment of a Hindu deity, and the inference has been drawn that the manifestation of the deity in the form of an image must be in existence at the time of the death of the testator. As reliance has been placed upon two decisions of the Judicial Committee, which, in so far as they decide any questions of law, are binding upon this Court, it is essential to examine closely the decisions themselves, and to determine whether they are really applicable to the matter now under discussion. In this connection, it is useful to bear in mind the well known observation of Lord Halsbury in *Quinn* v. *Leathem*,[1] that a case is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to follow logically from it.

In the case of *Tagore* v. *Tagore*[2] the question which arose for consideration was as to the validity of testamentary bequests and gifts *inter vivos*, in favour of human beings. With reference to this subject, their Lordships of the Judicial Committee observed that the legal power of transfer under the Bengal School of Hindu law applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhaga, Chapter I, para. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." They then went on to add that, by a rule generally adopted in jurisprudence, this class will include children in embryo, who afterwards might come in separate existence, and also by legal fiction, and adopted son, who, in contemplation of law, is "begotten by the father who adopts him, or for and on behalf of whom he" is adopted; apart from this exceptional case which serves to prove the rule, the law was plain that the donee must be a person in existence capable at the time when the gift takes effect. It is not necessary for my purpose to investigate the precise scope of the passage of the Dayabhaga upon which reliance has been placed in support of the proposition that a gift

[1] (1901) App. Cas. 495, 506.

[2] (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.

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the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift.' It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shoolapani in his Sraddhabibeka discusses whether a *sradh* can be called a gift, and in that connection observes as follows :—

न च दानरूपता, उद्देश्यपित्रादि-गतस्वत्वजनकत्वात्। अस्वामित्वच पित्रादीनां तत्तेदमिति स्वीकाराभावात्। आदित्यादिदेवतासम्प्रदानकदाने तु दानशब्दो गौणः, तदङ्गदक्षिणादानायतिर्देशार्थः। देवतामीदक्षियाम इत्यादि प्रयोगस्तु गौण एव इत्युक्तम् तिर्थेनधिकरणे। (Calcutta Edition, 1892, page 25.)

Of this passage, the following version will give a fairly accurate idea :—

"*Sradh* has not the nature of a donation, as it does not generate ownership in the *manes*, etc., for whom it is intended. The absence of ownership of *manes*, etc., is due to the absence of acceptance on their part by the words 'this is mine.' In 'donation,' having for its dative case the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension to it of the inseparable accompaniment of that (*gift* in its primary sense), *viz.*, the offer of the sacrificial fee, etc. In has already been remarked in the Chapter on the *bratis* that such usage as *devagram*, *hastigram*, etc., are secondary."

Upon this passage Sree Krishna comments are follows :—

देवानां च इन्द्रादीनां चेतनतया द्रव्यस्वान्वभावात्। तर्हि कथं देवग्राम इति प्रयोगः, गौण इत्युक्तं तिर्थेनधिकरणे।

"The Gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the expression *devagram* (village of the Gods) be used? It has

This is translated by Colebrooke as follows: "Gift consists in the effect of raising another's property; and that effect would here depend on the donee." (Chapter I, para. 22.) 1909 Bhupati Nath Smritirtha v. Ram Lal Maitra.

On the first of these passages Rambhadra comments as follows:

एतेन स्वत्वफलकोद्देश्यकस्त्यागो दानमिति दानलक्षणं सूचितम्।

"By this, 'gift is abandonment characterised by the result of ownership'—this definition of gift is indicated."

Sreenath comments as follows:

एतेन स्वत्व-फलोद्देश्यक त्यागरूपं दानलक्षणमित्युक्तम्।

"It is said hereby that the definition of donation is abandonment characterised by the result of ownership."

Sreekrishna comments on the passage as follows:

त्यागमात्रात् वृषोत्सर्गादिवत् स्वत्वानुत्पत्तेराह "चेतनोद्देशेनेति"। "उद्देश्यः स्वत्वेन विवक्षितः। स च त्यागेच्छाया विषय एव इति"।

"As ownership does not arise from every act of abandonment *like the offering of a bull*, etc., he (the author) adds 'intended for some conscious being.' The intention must have for its object the ownership (of another) and this object is the object of the desire of abandonment."

On the second passage, Rambhadra comments as follows:

[illegible]

"Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another as from the taking of the property of the Gods. The passage of Manu 'Those who steal the property of the Gods or the property of the Brahmans, etc.,' refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahman's property becomes superfluous. Thus, there being no other way to avoid this inconsistency, the terms 'property' (स्व) and 'stealing' (हरण) must be taken in a figurative or secondary sense."

It is clear from these passages, as well as from other passages from Sreenath, Achyutananda, and other commentaries on the Dayabhaga, that they understood the rule about

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the acceptance of a gift as a necessary condition for its validity as applicable to secular gifts alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift.' It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

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"The Gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the expression *devagram* (village of the Gods) be used? It has

been remarked in the chapter on *kratis* that the sense here is secondary."

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Sree Krishna in his explanation of the term *devagram*, makes the following comments :

तथाचात्र स्वस्वामिभावरूपसम्बन्धबाधात् मुख्यषष्ठीयं न सम्भवति। किन्तु तदुद्देश्यक-त्यागे षष्ठीलाक्षणिकी, तेन देवोद्देश्यकत्यागविषयो ग्राम इत्यर्थे सीध्य इत्यर्थः।

"Moreover, the expression cannot be used here in its primacy sense. The relation of one's ownership being excluded, the possessive case affix in *devas* (in the term of *devagram*) figuratively means abandonment for them (the Gods). Therefore the expression is used in the sense of 'a village, which is the object of abandonment intended for the Gods.' This is the purport."

When we turn to the Suddhitatwa of Raghunandan, we find the subject of donation discussed. Thus in one passage he observes as follows :

तेन शास्त्रोक्तसम्प्रदानस्वत्वादेव दृष्टदानो दानम्। (Calcutta Edition, 1891, page 308.)

"Thus donation is the abandonment of an object productive of the ownership of a person to whom it is given as prescribed in the shastras."

In another passage he says again :—

एवञ्च दानात् निवृत्तमपि दातुः स्वत्वं सम्प्रदानादृष्टत्वात् असम्पादकत्वे न तस्य खण्डनमस्ति। (Page 341.)

"Thus, though the ownership of the donor ceases to exist in consequence of abandonment on account of the non-acceptance by the person to whom it is given, it is incomplete and consequently it is not regarded as a donation in the Vedas."

In a third passage Raghunandan makes the following remarks :

तत्र उद्दिश्य पात्रविशेषो यदि न स्वीकरोति, तदा सोपाधित्यागविशेषक अनिष्पादात् दातुः स्वत्वं निवर्तते इति रत्नाकरप्रभृतयः। (Page 308.)

"Thus, if the particular person for whom a gift is intended does not accept it, then as the abandonment with all its conditions is not fulfilled, the ownership does not terminate. Such is the view of Ratnakar and others."

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This indicates that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree Krishna in a passage of his commentary on the Sraddhabibeka :

यत द्रव्यत्यागेन स्वत्वजनने तत्प्रदानस्वीकार-प्रागभावोऽपि सहकारी कल्प्यते। यतएव उई या पात्रविशेषो यदि पश्चात् न स्वीकरोति, तदा सोपाधिस्वामयविशेषस्य अनिष्पादात् न दातुः स्वत्वं निवर्त्तते इति रत्नाकर प्रभृतयोऽपि वदन्ति। (Calcutta Edition, 1892. page 16.)

The following rendering gives a fair idea of the above passage :

"Here, in the generation of ownership by the abandonment of an object, the pre-existence of acceptance by the person to whom the object is given is regarded as an auxiliary case . . . . . Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then, as donation with all its conditions is not accomplished, the ownership of the donor does not cease to exist. This is maintained by Ratnakar and others."

To the same effect is the following passage from the Mitakshara, in which Vijnaneswara, commenting on verse 27 of the Vyavaharadhyay of the Institutes of Yajnavalkya, observes :

यत्नमभिसन्धिः स्वस्वत्वनिवृत्तिः परस्वत्वापादानं च दानम्। परस्वत्वापादनं च परो यदि स्वीकरोति तदा सम्पद्यते, नान्यथा। स्वीकारश्च त्रिविधः। मानसो वाचिकः कायिकश्चेति। (Bombay Edition, 1813 Saka, page 129.)

"Gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things—mental, verbal or corporeal."

This is also amply borne out by passages from the Bhasya of Savaraswami on the Purvamimansa. In one passage Savara defines the characteristics of a gift as follows :

दानमित्युच्यते स्वत्वनिवृत्तिः परस्वत्वापादानञ्च। (Adhyaya VI, Pada 1, Asiatic Society's Edition, Volume I, page 742.)

"A gift is the cessation of the ownership of one and the generation of the ownership of another."

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Savara in another passage observes as follows :

देवग्रामो देवक्षेत्रम् इति उपचारमात्रं, यो यदभिप्रेतं विनियोक्तुमर्हति, तत् तस्य स्वं न च ग्रामं क्षेत्रं वा यथाभिप्रायं विनियुङ्क्ते देवता, तस्मात् न कस्यचित् ददाति, देवपरिचारकाणां ततो भृतिर्भवति, देवतां उद्दिश्य यत् त्यज्यते। (Adhyaya IX, Pada 1, Asiatic Society's Edition, Volume II, page 145.)

"Devagram (village of the Gods), Deva-kshetram (land of the Gods). These are figurative terms. What one is able to employ according to one's desire is one's property. The Gods, however, do not employ a village or land according to their use. Therefore, no (body) gives (to the Gods). Whatever is abandoned with reference to the Gods becomes a source of prosperity of the servants of the Gods."

Savara amplifies this view in the passage which follows and which need not be quoted at length for our present purpose, and he repeats the same opinion in Chapter 6, Section 1, Volume I, page 606, when he speaks of the Gods as [illegible], that is, not capable of possessing wealth, and explains the expressions *Abanagram* and *hastigram* as उपचारमात्रम्, that is, as merely figurative terms. See also Adhyaya IX, Pada 1 (Volume II, page 141), where Savara asserts that there can be no gift to Gods, as they have not body and are incapable of enjoyment. ([illegible]).

This view is supported by Medhatithi, the oldest and most authoritative of the commentators of Manu. Shastri Golap Chandra Sarkar on behalf of the respondent relied upon the following verse of Manu and the commentary of Medhatithi thereupon. (Mandlik's Edition, page 1354).

देवस्वं ब्राह्मणस्वं वा लोभेनोपहिनस्ति यः।
स पापात्मा परे लोके गृध्रोच्छिष्टेन जीवति॥ ११. २६॥

"That wicked man who misappropriates God-property (God's property) and Brahmana-property lives in the next world by the leavings of vultures. *Manu, XI, 26.*

[illegible]

१। [illegible]

MEDHATITHI'S COMMENTARY.

1. The property of persons of the three regenerate tribes that are in the habit of performing sacrifices is (to be understood

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by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflicted); and the property of a Brahman who is not in the habit of performing sacrifices is "Brahman-property."

२। एवमपि श्लोको गमयितव्य। अर्थवादश्लोकोऽयम्।

2. Even in this manner this verse may certainly be explained. This sloka (verse) becomes (then) a laudatory one.

३। धनं यज्ञशीलानामिति न चौर्य्यादिशब्दवच्छब्दार्थपरिभाषापरः।

3. For the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning) derived from the primary meaning of the words (composing the term, namely, God and property) like (the meaning of) the term stealing and the like (but a figurative meaning).

४। अतोऽन्यथा व्याख्यायते देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्वं, मुख्यस्य स्वत्वाभिसम्बन्धस्य देवानाम् असम्भवात्।

Hence (the term) is explained in another manner (thus)—Property that is set apart or relinquished for the purpose of performance of sacrifices and the like in honour of Gods is (to be taken as intended by the term) "God's property" by reason of the impossibility of the application to Gods of the primary meaning, namely, the relation of property and owner (a thing is property in relation to a person having proprietary rights over it, and a person is owner in relation to a thing over which he can exercise proprietary rights).

५। नहि देवता इच्छया धनं नियुञ्जते न च परिपालनव्यापारस्तासां दृश्यते, स्वञ्च लोके तादृशमुच्यते तस्मात् बोद्धं येन यदुक्तं नेदं मम देवताया इदमिति—यद् वस्तु तद्देवस्वं दर्शपूर्णमासादि-यागेष्वग्न्यादिदेवताभ्यश्चोदितं शिष्टसमाचारप्रसिद्धेन गौणोपायदुर्गायागादिषु।

5. For the Gods do not use the property according to pleasure, nor is their found exertion for the protection (of the property): and property is described to be of that character in popular view. Accordingly, when by referring or pointing to Gods, it is stated—This is not mine, this is God's—that is God's property—and that property is enjoined (by the Vedas) for the Fire-God and the like in the Darsa-purnamassa sacrifice and the like—(and also enjoined) by the well-known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining

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spiritual benefit, but not primary, inasmuch as these are not enjoined by the Vedas).

६। न च चतुर्भुजादिप्रतिमास्वपि लोके देवस्वमुच्यते [illegible]

6. It cannot be argued that in popular view (property) relating to the four-armed or the like image (of Gods) is called "God's property," and it is proper to put the popular meaning on words (employed) in the Shastras.

७। [illegible]

7. It would be so if the term "God-property" acquired notoriety (in that sense), undivided (into, or without reference to, its component parts)—God and property; but by reason of the notoriety to the component parts, namely, God's property is God-property, the meaning of the whole (as consisting of the meanings of the component parts) is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning.

८। मुख्य चतुर्भुजादिना देवत्वं [illegible]।

8. The assumption that the four-armed and the like have the status of God in the primary sense, is removed by the very use of (the term) image (in para. 6).

९। न च [illegible]

9. Nor can it be argued that although there is no God in the primary sense, still let such property be God's property by usage. Be it so; but there cannot be the relation and owner. The use of the term property (as God's) may be reconciled in the manner stated (above by us). This is discussed in the second.

The concluding reference is to the commentary of Medhatithi himself on the Second Book of the Institutes of Manu where he observes as follows on verse 189:

[illegible] (Mandlik's Edition, page 237).

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It should be noticed that such expressions as property of the Gods, animals of the Gods, thing of the Gods, etc., mean animals, etc., supposed to be intended for the Gods. In the section on punishment, the term (दैवता) 'God' is desired to be used in the sense of images only; otherwise there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods, Brahmans and Kings should be known, etc., *i. e.*, a thing belonging to the Gods which is connected with an imaginary ownership of the images or likenesses imagined to be Gods. *The Gods have no ownership of their own*, and so the primary sense being inadmissible here, the secondary sense alone should be accepted."

It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharyya, however, in his commentary on the following passages of the Nirukta, seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the terms.

The following version will give a fairly accurate idea of the passage which deals with the subject of the anthropomorphic and physical conception of the Gods :—

अथाकार चिन्तनं देवतानां पुरुषविधाः स्युरित्येकं चेतनावद्वद्धि स्तुतयो भवन्ति तथाभिधानान्यथापि पौरुषविधिकैरङ्गैः संस्तूयन्ते। "ऋष्वा त इन्द्र स्थविरस्य बाहू" (ऋग्वेद ६।७।२१।३)। "यत् संगृभ्णा मघवन् काशिरित्ते" (३।२।१।५) तथापि पौरुष विधिकैः द्रव्य संयोगैः। आ द्वाभ्यां हरिभ्यामिन्द्र याहि (२।६।२१।४) "कल्याणीर्जाया सुरणं गृहे ते" (३।३।२४।६) अथापि पौरुष विधिकैः कर्मभिः। अद्धीन्द्र पिब च प्रस्थितस्य"। (८।६।२१।८) "आश्रुत् कर्ण श्रुधी हवम् (१।१२।०।९) * * * अपुरुष विधा स्युरित्यपरमपि तु यद् दृश्यते पुरुषविधं तद् यथाग्निर्वायुरादित्यः पृथिवी चन्द्रमा इति यथो एतच्चेतनावद्वद्धि स्तुतयो

भवन्ति इत्यचेतनान्यप्येवं स्तूयन्ते यथाक्षप्रभृतीन्योषधिपर्यन्तानि यथो एतत् पौरुषविधिकै- 1909
रङ्गैः संस्तूयन्त इत्यचेतनेष्वप्येतद्भवति "अभिक्रन्दन्ति हरितेभिरासभिरिति" ([illegible]) Bhupati Nath Smrititirtha
ग्रावस्तुतिः यथो एतत् पौरुषविधिकैर्द्रव्यसंयोगैरित्येतदपि तादृशमेव सुखं रथं युयुजे v.
सिन्धुरश्विनम् ([illegible]) इति नदीस्तुतिः यथो एतत् पौरुषविधिकैः कर्मभिरित्येतदपि तादृशमेव Ram Lal Maitra.
"होतुश्चित् पूर्वे हविरद्यमाशत" ([illegible]) इति ग्रावस्तुतिरेव । (निरुक्त उत्तरषट्क दैवत
काण्ड : अध्याय [illegible], पाद [illegible], खण्ड [illegible])।

"One conception of the shapes of the Gods is that (they are) like human beings, inasmuch as the praises (of the Gods) speak of them like conscious beings. So also are their designations. They are praised with man-limbs. As in Rigveda, 4, 7, 31, 3: 'Oh Indra! Thou art bulky in thy graceful arms.' Rigveda, 3, 2, 1, 5: 'Oh Maghaban! As thou joinest together the two worlds (earth and heaven) large as thy fist.' (They are praised also) as possessed of things used by men. Rigveda, 2, 6, 21, 4: 'Come Indra! with a pair of horses.' Rigveda, 3, 3, 19, 6: 'In thy house is an auspicious wife [Sachi]: they are praised also with acts of human beings.' Rigveda, 8, 6, 21, 8: 'Eat, Oh Indra! and drink of (these) lying before.' Rigveda, 1, 1, 20, 9: 'Oh Indra! having ears, hearing all round, listen to our invocation quickly.' The other (conception of the shapes of the Gods) is found to be that (the Gods) are not like human beings, as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised, such as dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings. So it is even with unconscious things. Rigveda, 8, 4, 29, 2: 'These stones used for pressing out (*soma* juice) with their green mouths are crying after (the Gods).' As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings. Rigveda, 8, 3, 7, 4: 'Sindhu river joined a comfortable chariot furnished with horses.' As this is a praise of the river, so is the (following) nothing but a praise of stones by attributing actions like those of human beings. Rigveda, 8, 4, 29, 2: 'Let the stones eat clarified butter fit for eating before the invoker of the Gods (Agni).'"

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The same view is supported by Rigveda, ?, 1, 11, 1, and Atharvaveda, Book XX, Hymn 26, 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the king is the custodian of all such property. This is sufficiently indicated by the following passages: Vijnaneswara in the Mitakshara (Vyavahara Adhaya, verse 186) lays it down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraneeti, Chapter IV, verse 19, stress is laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God.

It may futther be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana:

मुञ्जेनार्त्तेन वा दत्तं यत्किंचित् धर्मकारणात्। यदत्त्वा तु मृते दाप्यस्तत्सुतैनावसंशयः॥

which is rendered by Mandlik as follows (page 124, Edition Yajnavalkya):

"If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt."

There can be no question as to the genuineness of the passage, because it is quoted with approval in the Mitakshara, Viramitrodaya, Vyavaharamadhaba, Vyavaharamayukha,

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Kamalakar's Vivadatandab, Raghunandan's Suddhitattwa, Vivadaratnakar, and in Jagannath's Vivadabhangarnaba translated by Colebrooke. The spirit, if not the letter, of this text is entirely inconsistent with the position that a direction given by a Hindu that an image of a deity should be established, and that his property should be applied for the maintenance of the worship, is inoperative, because the image was not established by himself. Jagannath in Book II, Chapter IV, Section I, verse 3, touches upon this matter, and points out that the text of Narada relating to the recovery of objects of gifts not duly given (Asiatic Society's Edition, 137) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of *Tagore* v. *Tagore*[1] and *Bai Motivahu* v. *Bai Mamubai*[2], as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be upheld, inasmuch as the deity is always existent, and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a particular image of Kalee is established or not, the Goddess Kalee is ever existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following passage quoted by Raghunandan :

चिन्मयस्याद्वितीयस्य निष्कलस्याशरीरिणः ।
उपासकानां कार्यार्थं ब्रह्मणो रूपकल्पना ।

"It is for the benefit of the worshippers or devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute, which consists of pure spirit and which is without a second being."

[1] (1872) 9 B. L. R. 377; 18 W. R. 359; L. R. I. A. Sup. Vol. 47.

[2] (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.

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Various passages of the same import are to be found in other authorities, for instance, Haratatwadidheeti and Mahanirvantantra (4, 16), the latter of which quotes a passage from Mundamalatantra and gives other texts of similar import from Kularnabtantra and Agastya Sanhita. From this point of view also, the position of the appellant may be undoubtedly supported; but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.

Let us now consider the decided cases from the point of view of the principles already explained. The cases of *Upendra Lal Boral* v. *Hem Chandra Boral*[1], *Rajomoyee Dasee* v. *Troylukho Mohiney Dasee*[2] and *Nogendra-Nandini Dassee* v. *Benoy Krishna Deb*[3] proceeded on the assumption that the rule in the case of *Tagore* v. *Tagore*[4] and *Bai Motivahu* v. *Bai Mamubai*[5] is applicable to cases of dedication of property for the establishment of images of deities and for their worship. The case of *Promotha Nath Roy* v. *Nagendrabala Chaudhrani*[6] rests on the same assumption. The case of *Doorga Proshad Dass* v. *Shee Proshad Paudah*[7] does not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become spiritualised. Nor does the earlier case of *Sibchunder Mullick* v. *Treepoorah Soondry Dossee*[8] really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand the cases of *Ramtonoo Mullick* v. *Ramgopal Mullick*[9], *Gokool Nath Guha* v. *Issur Lochun Roy*[10], *Prafulla Chunder Mullick* v.

[1] (1897) I. L. R. 25 Calc. 405.
[2] (1901) I. L. R. 29 Calc. 260.
[3] (1902) I. L. R. 30 Calc. 521.
[4] (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
[5] (1897) I. L. R. 21 Bom. 790; L. R. 24 I. A. 93.
[6] (1908) 12 C. W. N. 808.
[7] (1880) 7 C. L. R. 278.
[8] (1842) Fulton 98.
[9] (1829) 1 Knapp. 245.
[10] (1886) I. L. R. 14 Calc. 222.

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Jogendra Nath Sreemany,[1] *Ashutosh Dutt* v. *Durga Charn Chatterjee*,[2] *Hemangini Dasi* v. *Nobin Chand Ghose*,[3] *Parbati Bibee* v. *Ram Baran Upadhya*,[4] *Jairam Narayan* v. *Kunhiraman*,[5] *Mandhar* v. *Keshavrao*,[6] *Bhupobutty Peramun Sen* v. *Gopee Pramun Sen*[7] are all based on the contrary assumption that a trust for a religious purpose is not invalid, because the image to be established is not in existence at the time of the death of the testator, and I may add that this latter view undoubtedly represents what was regarded as the law from the time of the decision of the Judicial Committee in 1829 down to 1897. These decisions appear to me to be consistent with the true rule of Hindu Law as deducible from the authorities I have already examined. It is, however, I think, possible to show that the view indicated above not only represents the true rule of Hindu Law, but is consistent with the rules of English law in similar matters.

Under the English law it is well-settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed "in the service of my Lord and Master" or "for the worship of God" are valid. In support of this proposition, reference may be made to the decisions in *In re Darling*[8] and *Attorney General* v. *Pearson*.[9] In the former of these cases, reference is made to the decision of Lord Manners in *Peacecourt* v. *Powerscourt*,[10] the decision in which was followed in *Felce* v. *Rendell*.[11] In the second case, Lord Eldon observed that if lands or money were given in such a way as would be legal, notwithstanding the statutes concerning disposition of charitable uses, for the purposes of building a church or a house or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, the Court of Chancery would execute such a trust by making a provision for maintaining and propagating the established religion of the country. This is in agreement

[1] (1906) 9 C. W. N. 528.
[2] (1879) I. L. R. 5 Calc. 488; L. R. 6 I. A. 182.
[3] (1882) I. L. R. 8 Calc. 788.
[4] (1904) I. L. R. 31 Calc. 895.
[5] (1885) I. L. R. 9 Bom. 401.
[6] (1879) I. L. R. 12 Bom. 367.
[7] (1897) I. L. R. 25 Calc. 112.
[8] (1903) 1 Ch. 50.
[9] (1817) 3 Mer. 353, 401; 17 R. R. 105.
[10] (1824) 1 Molloy 616.
[11] (1842) 8 Ir. Eq. Rep. 701.

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with the view previously indicated by the Lord Chancellor in *Mills* v. *Farmer*,[1] namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us, in which no question of indefiniteness can possibly arise, consequently occupies a much stronger position.

It is further clear that, under the English law, a valid gift may be made to a charity not *in esse* at the time, but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, for the benefit of any private corporation or person, or perpetuity in a prior taker. One of the most recent decisions on the subject is that of *Wallis* v. *Solicitor-General for New Zealand*[2] which was heard on appeal by the Judicial Committee from New Zealand. In that case, certain Maori chiefs had in 1848 given 500 acres of land to the Bishop of New Zealand for a college to be erected thereon for the general purpose of promoting religion. Up to 1898, no college had been erected, and it was found that the land had in course of time become an unsuitable site, while the accumulation of its rent had amounted to a considerable sum. It was ruled that there was an express gift of land and money for charitable purposes, and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within any defined limit of time and might never take effect at all. It was further held that the doctrine of *cy-pres* was applicable. Lord Macnaghten in his judgment relied in support of this proposition upon the decision of Lord Selborne in *Chamberlayne* v. *Brockett*.[3] This, however, is only one of many instances in which the English Courts have affirmed this doctrine, and the cases where charitable gifts to non-existent corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of *Attorney-General* v. *Downing*[4] and under the name of *Attorney*

[1] (1815) 19 Ves. 482; 1 Mer. 55.
[2] (1903) App. Cas. 173.
[3] (1872) L. R. 8 Ch. App. 206.
[4] (1766) 2 Amb. 550, 571; Wilm. 1; Dick 414.

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General v. *Bowyer*.[1] Other cases in which the same rule has been affirmed are those of *Attorney General* v. *Bishop of Chester*,[2] *Lonsdale* v. *Wintringham*,[3] *Attorney General* v. *Craven*[4], *Martin* v. *Maughan*[5], *Henshaw* v. *Atkinson*[6], *In re Clergy Society*,[7] *In re Maguire*[8] and *Sinnett* v. *Herbert*.[9] The Supreme Court of the United States has on several occasions affirmed the same doctrine after an elaborate review of the English decisions on the subject. *Inglis* v. *Sailors Snug Harbour*,[10] *Trustees* v. *State*,[11] *Ould* v. *Washington Hospital*,[12] *Russell* v. *Allen*[13] and *Jones* v. *Habersham*[14]. In the third and fourth of these cases, many of the decisions in England to which we have referred are minutely examined, and the rule is laid down that a gift for charitable uses is valid, even though it is in favour of a non-existent corporation or society. I refer to these English and American decisions not as authorities in any way binding upon this Court, but solely to illustrate the position that the conclusion at which we arrive upon a strict interpretation of the texts of Hindu Law, is consonant with the principles which have been adopted independently in other systems of jurisprudence. We cannot overlook the fact that as pointed out in the case of *Trikamdas Damodhar* v. *Haridas Morarji*,[15] their Lordships of the Judicial Committee, when called upon to decide an analogous question in *Ranchordas Vandravandas* v. *Parvatibai*,[16] placed considerable reliance upon the decisions of the English Courts in similar matters, although in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmanya Ayyar in *Parthasarathy Pillai* v. *Thirumalai Pillai*,[17] quite in harmony with the true doctrine of Hindu jurisprudence.

[1] (1798) 3 Ves. Jun. 714;
(1800) 5 Ves. Jun. 339;
(1803) 8 Ves. 256.
[2] (1785) 1 Bro. C. R. 414.
[3] (1850) 13 Beav. 87; 51 E. R. 34.
[4] (1856) 21 Beav. 392;
52 E. R. 910.
[5] (1844) 14 Sim. 230; 60 E. R. 340.
[6] (1818) 3 Madd. 536.
[7] (1856) 2 Kay & J. 615;
69 E. R. 928.
[8] (1870) L. R. 9 Eq. 632.
[9] (1872) L. R. 7 Ch. App. 232.
[10] (1830) 3 Peters 99, 114.
[11] (1852) 14 Howard 274.
[12] (1877) 95 U. S. 303.
[13] (1883) 107 U. S. 163.
[14] (1882) 107 U. S. 174.
[15] (1907) I. L. R. 31 Bom. 283.
[16] (1906) I. L. R. 28 Bom. 725;
L. R. 26 I. A. 71.
[17] (1907) I. L. R. 30 Mad. 140.

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To sum up :

(*i*) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double fiction, namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence.

(*ii*) The Hindu Law recognises dedications for the establishment of the image of a diety and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra-commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments : *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[1] affirmed, on appeal, by the Judicial Committee in *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar*.[2] It is immeterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds, I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

COXE J. I agree with the learned Chief Justice.

CHATTERJEE J. The testator Umesh Chandra Lahiri died on the 28th June, 1890 after having made a will on the 26th of June, 1890. Amongst other matters the will provided,— "All my properties shall be placed in the hands of " Babus so and so " as trustees." They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his *guru* Hari Nath Bhattacharyya and Rs. 5 to his *purohit* Sreesh Chandra Chakrabarti, to defray the cost of the worship of the family *Thakurs*. It also directed that "they shall spend the surplus income which may be left, in the

[1] (1887) I. L. R. 12 Bom. 247.
[2] (1899) I. L. R. 24 Bom. 50; L. R. 26 I. A. 199.

sheba and worship of Kalee, after establishing the image of the Kalee after the name of my mother, *i.e.*, in the name of *Iswar* Anandamoyee Kalee." "I further provide that if for any reason, the image of *Iswar* Kalee Debee is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudeb* and his sons, grandsons, etc., in succession, shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell, etc."

In accordance with the above direction, the executors established and consecrated, in the month of October or November 1894, an image of the Goddess made of earth, and later on, in the year 1894, replaced the same by one made of stone, and had a temple built for its location. They thus carried out the direction in the will, and the worship has ever since been carried on. On the 4th July, 1904, the plaintiffs, who are the sons of the *guru* of the testator, brought the present suit for the construction of the will, for a declaration that the trust for the establishment and consecration of the image of Goddess Kalee and her worship was void, for possession of the Rangpur properties and for an account and mesne profits. The Court of first instance held that the bequest in favour of the Goddess Kalee was valid, and dismissed the suit. On appeal by the plaintiffs the Division Bench, disagreeing with the case of *Upendra Lal Boral* v. *Hem Chandra Boral*[1] and some later cases which followed the same, referred the following questions for the decision of the Full Bench:—

(*i*) Does the principle of Hindu Law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hem Chandra Boral*[1], *Rajomayee Dassee* v. *Troylukho Mohiney Dassee*[2] and *Nogendra-Nandi Dassi* v. *Bonoy Krishna Deb*[3] have

[1] (1897) I. L. R. 25 Calc. 405.
[2] (1901) I. L. R. 29 Calc. 290.
[3] (1902) I. L. R. 30 Calc. 521.

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been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

The cases mentioned in the order of reference are all, more or less, based on the decision of the Privy Council in the great *Tagore case*[1]. The said case was in respect of a gift to a human being and was based on a passage in the Dayabhaga, Chapter I, para. 21, which is to the following effect:—

२१ अन्य व्यापारेऽन्यस्य स्वत्वमविरुद्धं शास्त्रमूलत्वादस्य। दृश्यते लोकेऽपि दानेऽपि चेतनोद्देशविशिष्टत्यागादेव दाढ्यव्यापारात् सम्प्रदानस्य द्रव्ये स्वामित्वं।

"The right of one may consistently arise from the act of another; for an express passage of law is authority for it; and that is actually seen in the world, since, in the case of donation, the donee's right to the thing arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person."

Colebrooke's translation.

The next paras. 22 and 23 go on to say that the title of the donee accrues before the acceptance and para. 24 says that the acceptance makes the title which has already accrued capable of full enjoyment, thus differing from the Mitakshara which holds that title does not accrue before acceptance. The author is here incidentally dealing with the meaning of the word gift and does not make any further reference to the subject. Of the commentators on the Dayabhaga, Sreenath says चेतनपदं चेतनविशेषपरं अतो न यागे गवादि पशावतिप्रसक्तिः "the word 'sentient' is spoken of, of some particular sentient being and the definition of gift is not wide enough to include *jaga* (or gift in favour of a deity) or the worship of a cow, etc., (to which things are given)." Achyutananda says त्यागमात्रं हयोत्सर्गादावति प्रसक्तमत आह चेतनेति: "simple त्याग or relinquishment would be wide enough to include the dedication of the sacred bull, etc., and therefore the word 'sentient' is used." Sreekrishna Tarkalankar also says त्यागमात्रात् वृषोत्सर्गादि स्यात् स्वामित्वाजन नादाह चेतनोद्देशेति "as in the dedication of the sacred bull no title to the same accrues to any one, the word *tyaga* or relinquishment is spoken of in reference to a sentient being."

[1] (1872) 9 B. L. R. 377; 18 W. R. 353; L. R. I. A. Sup. Vol. 47.

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All these commentators, therefore, understand the definition as limited to secular gifts as contradistinguished from gifts of the nature of *joga*, which is a technical word meaning [illegible] "or relinquishment of property intended for a deity or other religious dedications, such as that of the sacred bull at a *sradh*." The subject of *dana* or gift, however, is dealt with in some detail by Narada in the chapter on the subtraction of gifts, and in making a subdivision he says:—"In civil affairs the law of gift is four-fold—(i) what may be given, (ii) what may not be given, (iii) what is given or a valid gift, (iv) what is not given or invalid gifts. Colebrooke's Dig., Vol. I, page 401. In commenting on the above, Jagannath Tarkapanchanan says:—"the rule to be established that gifts made by a man afflicted with disease and the like are void, regards civil gifts, not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose: the donation is valid if it be made by the owner of the thing." Jagannath then quotes the text of कात्यायन (Katyayana):—

सुस्थेनार्त्तेन दत्तं श्रावितं धर्म्मकारणात् अदत्वा तु मृते दाप्यस्तत्सुतो नात्र संशयः "What a man has promised in health or in sickness for a religious purpose must be given; and if he die without giving it, his son shall doubtless be compelled to deliver it."

The same text is quoted with approval by the Vivada Ratnakar (see page 136, Bibliothica Indica Series), where the author, in commenting upon another text of Katyayana as to invalid gifts, says [illegible], *i.e.*, "gift by a person affected with disease (being invalid) must apply to gifts other than those made for a religious purpose." Raghunandan in his शुद्धितत्त्व[2] (Shudditatwa) quotes the same text of Katyayana and says [illegible] *i.e.* "in the same way the pleading of a gift by a dying person among invalid gifts has reference to gifts made for other than religious purposes." See also Vyavastha Darpan, 3rd Edition—Vyavastha 718, page 623 (Part I), and the authorities quoted.

It appears that the word दान or gift, when spoken of in respect of the deity, is used in a गौण or भाक्त, *i.e.*, secondary or figurative sense. The Sradhabibeka of Shoolapani says[1] [illegible]

[1] Sradhabibeka, Uhandi Charan's Ed., p. 18. [2] Bangabasi Edition, p. 2[illegible].

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सम्प्रदानकदानेतु दानशब्दो गौणः सङ्कल्पदक्षिणादानपतिदेशार्थः,[1] *i.e.*, "the use of the word दान or gift in respect of a gift to the Sun and other Gods is secondary or figurative and intended to signify, by analogy, the giving of the fee in either case." Sreekrishna Tarkalankar, the great commentator of the Dayabhaga, in his commentary on the above passage, says तथाचात्र स्वस्वामिभावरूप सम्बन्धाभावात् मुख्यप्रयोगो न भवत्येव, *i.e.*, "here also the use of the word in its primary sense is impossible, as there is no sense of one's own ownership" (like that of the donee in a secular gift).

Medhatithi, the great commentator of Manu, in commenting upon the word *devaswam* (god-property) in Manu, Chapter XI, Section 26, says देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्धि दत्तं मुख्यया स्वस्वामि सम्बन्धया देवानाम् सम्बन्धात् नहि देवता इच्छया धनं निभुञ्जते न च परिपालनव्यापार वासां दृश्यते, *i.e.*, "Property that is relinquished in favour of Gods for sacrifices in their honour is called god-property, by reason of the impossibility of the application to Gods of the (ordinary) relation of owner and thing owned. For the Gods do not use the property according to their pleasure, nor do we see them exerting for the protection of the same."

Again ननु चतुर्भुजादि प्रतिमा सन्धि लोके देवस्वमुच्यते, लोक प्रसिद्धय शब्दार्थः शास्त्रे यद्दीतं नाम्नः सादृश्यं यदि देवस्वशब्दोनिभागः प्रसिद्धिमुपेयात्, देवानां स्वं देवस्वमित्यवयव प्रसिद्धा समुदायार्थः प्रकृष्टः न च वाक्यान्तर प्रकल्पना प्रमाणेनाश्रयि। मुख्यं चतुर्भुजादिना देवत् प्रतिमाव्यवहारेणैवोपपद्यते न च यदुक्तलक्षणमस्ति। अथ मनोचारतो देवस्वं भवतु स्वस्वामि भाव लाक्षणिकेन च प्रकारेण स्वव्यवहारोपपत्तिरिति सिद्धं द्वितीयं। "It cannot be argued that in popular view (property relating to the four-armed or the like *image* of God) is called "god-property," and it is proper to put the popular meaning on words occurring in the *shastras*. It would be so if the term 'god-property' acquired notoriety (in that sense) as a single undivided word; but by reason of the notorious meaning of the component parts of the word, namely, God and property, the meaning of the whole, that is, God's property is god-property, is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have the status of God in the primary sense is removed by the very use of the term image. Nor can it be argued that although there is no

[1] Sradhabibeka, Chandi Charan's Ed., p. 22.

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God in the primary sense in such cases, still let such property be god-property by usage. Be it so, but there cannot be the relation of owner and thing owned. The use of the term property (as God's) may be reconciled in the manner stated. This is discussed in the second Chapter of the Mimansa of Jaimini." Kullooka Bhatta, in his commentary on the same words, says: प्रतिमादि देवतार्थमुत्सृष्टं सर्वं देवस्वं, *i.e.*, "the property dedicated for the images and other deities is called *devaswam*." It would appear sufficiently clear from the authorities that the definition of gift referred to by the Dayabhaga, Chapter I, Section 21, is in respect of a secular gift and not a gift for religious purpose. This disposes of the applicability of the *Tagore case*[1] and also the case of *Bai Motichand* v. *Bai Mamubai*,[2] which latter case may be further distinguished as being governed by the Mitakshara law.

Even if we were to apply the definition, as given in the above text of the Dayabhaga, to such a gift, it would seem absurd to say that a deity is not a sentient being. If the deity exists and it manifests itself in the image upon the invocation of the worshipper with certain *mantras*, it cannot be said to be an insentient being. If it answers to the इहागच्छ इहतिष्ठ, *i.e.*, "come here," "stay here" of the votary, it cannot be said to be insentient. The text—

चिन्मात्रस्याद्वितीयस्य निष्कलस्याशरीरिणः।
उपासकानां कार्यार्थं ब्रह्मणो रूपकल्पना॥ रघुनन्दन—प्रतिष्ठातत्त्व

"For the use or benefit of the votary Brahman or God, although only existing in spirit and without a second, having no attribute and no body, assumes forms." Shastri's Hindu Law, 3rd Ed., page 420, shows the Hindu idea of the forms attributed to God for the convenience of worship. A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated *Thakur* become vested in the substituted *Thakur*. A Hindu does not worship the "idol" or the material body

[1] (1872) 9 B.L.R. 377; 18 W.R. 359; L. R. I. A. Sup. Vol. 47.

[2] (1897) I.L.R. 21 Bom. 709; L. R. 24 I. A. 93.

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made of clay or gold or other substance, as a mere glance at the *mantras* and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the *mantras* peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to either view, it is the relinquishment of property, in the name of the deity, for securing its gratification, that completes the gift, and such relinquishments are valid according to Hindu Law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God-head, that is worshipped in a particular form, but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu Law had such a gross idea of the divinity they worshipped. In this view of the case also, the text of the Dayabhaga relied on in the *Tagore case*[1] cannot invalidate the gift in favour of a deity whose image is consecrated after the death of the donor.

Then again, their Lordships of the Judicial Committee, in the *Tagore case*[1] say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned, as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator, although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name: 'Ram,' 'Syam' or 'Gopal.' It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will

[1] (1872) 9 B. L. R. 377; 18 W. R. 359; L. R. I. A. Sup. Vol. 47.

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show, but if it were necessary, there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

I have stated above that in the case of a gift to a God, the relation of an owner to the thing owned in its primary sense is considered to be wanting. Who then is the owner of the property? In a secondary sense, no doubt, the deity is the owner, but the *shastras* lay down दिये देयानि दातानि, दिये दत्तस्य रक्षिता वा सर्वे यजमदत्तादत्तस्य निष्फलं भवेत्, *i.e.*, "Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless."

Matsya Sooktam quoted by Raghunandan in his Shuddhitatwa.[1]

Every gift, therefore, in favour of a deity is a gift for the ultimate benefit of a Brahman or Brahmans, and may, therefore, be looked upon as a charitable gift.[2] It was held by Sir Raymond West in the case of *Mouhar Ganesh Tambekar* v. *Lakkhiram Govindram*[3] that a trust for a Hindu God and temple was one created for public charitable purposes. The God and temple, in that case, was a public one and the trust was, therefore, considered to be a public one. There is no reason why the gift in this case, which is expressly vested in trustees for the purpose of building a private temple and setting up a private diety, should not be considered a private charitable trust—'charitable' I say because the ultimate benefit must come to the *pujaris* and *sheboks*. "It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait* or manager": *Prosunno Kumari Debia* v. *Golap Chand Baboo*.[4] And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait*, not in the idol: *Jagadindra Nath Roy* v. *Hemanta Kumari Debi*[5]. Again, bequests for the performance of the periodical *poojas* of Durga, Kalee, etc., or for

[1] Suddhitatwa, Bang. Ed., p. 557.

[2] (1887) I. L. R. 12 Bom. 247, 253.

[3] (1875) 14 B. L. R. 450; 23 W. R. 253; L. R. 2 I. A. 146, 152.

[4] (1904) I. L. R. Calc. 129; L. R. 31 I. A. 203.

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the celebration of the periodical festivals, called Dolejatra, Rashjatra, etc., have been from very old times given effect to by our Courts. Instances will be found in the following cases :—

Ramtonoo Mullick v. *Ramgopaul Mullick* [1], *Ashutosh Dutt* v. *Doorga Churn Chatterjee*, [2] *Hemangini Dasi* v. *Nobin Chand Ghose*,[3] *Gakool Nath Guha* v. *Issur Lochun Roy*,[4] *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen*,[5] *Bisseswar Prasanna Sen* v. *Bhagabati Prasanna Sen*,[6] *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany*,[7] *Jairam Narronji* v. *Kuverbai*,[8] and *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram*[9].

If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

In the present case again, the testator does not expressly make a gift to Kalee or Anandamoyee Kalee. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way, by spending the same in the establishment, *sheba* and *pooja* of the Goddess Kalee under the name and style of *Iswar* Anandamoyee Kalee. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative.

Per Curiam. The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.

Case remanded.

Note.—Debutter property is property dedicated to a God or Gods. Where in a document there was nothing to show that there was such a dedication, except the use of the word "Debutter" and the grant is made apparently for the personal enjoyment of the grantee, and the grantor may have contemplated

[1] (1829) 1 Knapp. 45.
[2] (1879) I. L. R. 5 Calc. 438; L. R. 6 I. A. 182.
[3] (1882) I. L. R. 8 Calc. 788.
[4] (1886) I. L. R. 14 Calc. 222.
[5] (1897) I. L. R. 25 Calc. 112.
[6] (1906) 3 C. L. J. 606.
[7] (1905) 9 C. W. N. 528.
[8] (1885) I. L. R. 9 Bom. 491.
[9] (1887) I. L. R. 12 Bom. 247.

that the profits of the property, after satisfying the personal wants of the trustee, would be devoted to the service of the God whom he attended, such an expectation does not suffice to constitute a valid dedication to the God. *Shyama Charan v. Akhiram*, I. L. R. 32 Calc. 511; 3 C. L. J. 306; see also *Madan Mohan Jiu Thakur v. Monmatha*, 21 C. L. J. 42.

Dedication may be of the completest character or of a less complete character. The cases of *Soudamini v. Jogadindra*, 8 Moo. I. A. 66 and *Anukul v. Durga Churn*, I. L. R. 5 Calc. 458, L. R. 6 I. A. 182 are instances of a less complete character, in which notwithstanding a religious dedication, property descends (and descends beneficially) to heirs, subject to a trust or charge for the purposes of religion: *Jogodindra v. Hemanta Kumari*, I. L. R. 32 Calc. 129, L. R. 31 I. A. 203.

An idol is not a juridical person for all purposes. Thus suits regarding the management of a *Debutter* property can be brought by a *shebait*, though the deity is the owner. The right of suit is vested in the *shebait* but not in the deity: *Jogadindra v. Hemanta Kumari*, I. L. R. 32 Calc. 129; L. R. 31 I. A. 203. When one *shebait* succeeds another in the putni interest acquired for the benefit of an idol he must cause his name to be registered in the zemindar's sheristá under section 15 of the Bengal Tenancy Act: *Mahatallo v. Nalini*, 2 C. L. J. 377; 10 C. W. N. 42. The right to institute a suit for enhancement of rent under the provisions of the Bengal Tenancy Act is vested in the joint shebaits *Abdul Gafar v. Umatarini*, 19 C.W.N. 260.

A precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. The reason and spirit of cases make law, not the letter of particular precedent. *Fisher v. Prince*, 3 Bur. 1363.

A gift to charity is not to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. *Mills v. Farmer*, 19 Ves. 482; 1 Mer. 55; *Pelon v. Russell*, 4 L. Eq. R. 701. It was however held by the Allahabad High Court in *Phundan Lal v. Arya Pratt Nidhi Sabha*, 8 A. L. J. R. 944, I. L. R. 33 All. 793 that where the property was not dedicated to any particular deity, the gift was bad on the ground of uncertainty.

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Before Sir Asutosh Mookerjee, Knight, Judge, and Mr. Justice Beachcroft.

KATKI AND ANOTHER

v.

LAKPATI PUJARI.

[*Reported in 20 C. L. J. 319 ; 20 C. W. N. 19.*]

1914 May, 26.
1913 April, 22.

Appeal by Defendants Nos. 3 and 4.

Suit for declaration of title to land and for recovery of possession thereof.

The plaintiff, a member of a regenerate class, was alleged to be taken in adoption by his uncle A. The defendants were two of the daughters of A. They challenged the *factum* as well as the validity of the alleged adoption. The Courts below held that the adoption in fact took place, that *Datta Homam* ceremony, which was not performed, was not necessary in the case of an adoption of nephew, and decreed the suit.

The judgment of the Court was delivered by

MOOKERJEE J.—This is an appeal by the third and fourth defendants in a suit for declaration of title to land and for recovery of possession thereof. The property in dispute belonged to Pitabas, one of four brothers, who were members of a Hindu family governed by the Mitakshara law. The plaintiff is one of the sons of a brother of Pitabas, and his case is that he was taken in adoption by his uncle in the year 1909. The defendants, now appellants, are two of the daughters of Pitabas, who would be entitled to succeed to the estate of their father in the absence of an adopted son. They consequently challenge the *factum* as also the validity of the alleged adoption. The Courts below have concurrently found in favour of the plaintiff and decreed the suit. They have held on the evidence that the adoption did in fact take place, that since then the plaintiff has been treated as the son of Pitabas, that his thread and marriage ceremony has been performed as such, and that he has performed

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the annual Sradh ceremony of his adoptive father and enjoyed the turn of worship of the family deity as his successor-in-interest. The Courts below have also held that there is no evidence that the *Datta Homa* ceremony was preformed on the occasion of the adoption of the plaintiff, but they have taken the view that as the plaintiff was the nephew of his adoptive father, the performance of such ceremony was not essential. In this view, the adoption has been held valid and the claim of the plaintiff to the estate of his adoptive father sustained. The defendants have appealed to this Court and have reiterated the objection that the adoption was invalid, as the parties are Brahmins in whose case the Dattahoma ceremony is essential; in support of this view, reliance has been placed upon the case *Lachman Lall* v. *Mohun Lall*,[1] where Dwarkanath Mitter J., stated that the performance of the *putrashtijag* (apparently written inadvertently for Dattahoma) is essential to the validity of the adoption in the Dattaka form among the three superior castes. On behalf of the respondent, it has been argued that this is not an accurate statement of the rule on the subject, that, in any event, it is too broadly formulated, and that no Dattahoma is necessary when the son of a brother is taken in adoption. In support of this contention, reference has been made to the cases of *Attaram* v. *Madka Rao*,[2] *Govindayyar* v. *Doraisami*,[3] and *Valubai* v. *Govind*.[4] In our opinion, the contention of the plaintiff must prevail that the validity of his adoption has not been affected by the non-performance of the Dattahoma.

The claim of the plaintiff is supported by a text attributed to Yama: "The *homa* or the like ceremony is not necessary in the case of adoption of the daughter's or the brother's son; by the verbal gift and acceptance alone, that is accomplished; this is declared by the Lord Yama." This text is quoted by the authors of the Dattaka Kaumudi and Dattaka Darpana as one of Devala mentioned in the Saraswati Vilasa of Dwaipayana (Dattak Siromani by Prof. Bharat Chandra Siromani, published under the direction of Prasanna Kumar Tagore, pp. 45, 92, 244, 246) and the comment is added by the author of the

[1] (1871) 16 W. R. 179.
[2] (1884) I. L. R. 6 All. 276.
[3] (1887) I. L. R. 11 Mad. 5.
[4] (1900) I. L. R. 24 Bom. 218.

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Dattaka Darpana that the expression "brother's son" includes persons who are sapindas and sagotras, and that consequently it is only when an adoption is made of a samanodaka or sakulya sagotra, the rule for performance of the Dattahoma ceremony operates. The text which was quoted as early as 1821 by the Pandits consulted in connection with the case of *Hurbant Rao* v. *Govindrao*,[1] has also been accepted as genuine in the cases of *Valubai* v. *Govind*,[2] and *Atmaram* v. *Madho Rao*,[3] and its authority was treated as unquestionable by V. N. Mandlik (Yajnavalkya, page 483). The rule enunciated in the text of Yama was also recognised by a Full Bench of the Madras High Court in *Govindayyar* v. *Dorasami*,[4] on the authority of an opinion expressed by Ellis that Dattahoma, though proper in all cases, was not indispensable if the person adopting and the boy adopted were of the same gotra. It has been argued, however, that the text of Yama is not based on any intelligible reason which could justify a departure from the general rule that the Dattahoma is an essential ceremony for the validity of an adoption amongst members of the three regenerate classes. We are not prepared to accept this contention as well founded. There has been considerable divergence of opinion amongst text-writers, ancient and modern, which is reflected also in judicial decisions upon the question, whether the Dattahoma is essential for the validity of an adoption, and even if it be conceded that there is a strong body of opinion in favour of the view that it is obligatory in the case of adoption amongst Brahmins, we would not be disposed to ignore or even to minimise the effect of an exception for which direct authority may be found in a text of unquestionable genuineness and authority.

To take the texts first, it is plain that Manu undoubtedly contemplated nothing more than gift and acceptance for the validity of an adoption in the Dattaka form, as in defining the Dattaka son he says that the gift is to be made 'together with water,' that is, as Sir William Jones renders it, the gift is confirmed by pouring water. "That (boy) equal (by caste) whom his mother or his father affectionately gives, (confirming

[1] (1821) 2 Borr. 83.
[2] (1899) I. L. R. 24 Bom. 218.
[3] (1884) I. L. R. 6 All. 270.
[4] (1887) I. L. R. 11 Mad. 5.

the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima)" [Manu, IX, 168; S. B. E., Vol. XXV, p. 361]. It is noteworthy that none amongst the commentators of Manu, not even Medhatithi, the oldest among them, touches upon this question. (Mandlik's Manu, p. 1202). Vasistha describes the ceremonies in a more developed form, though not in the passage (XVII, 29; S. B. E., Vol. XIV, p. 87) where he classifies the different kinds of sons. He directs that "he who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt offerings in the middle of the house, reciting the Vyahritis, and take (as a son) a not remote kinsman, just the nearest among his relatives." (Vasistha, XV, 6; S. B. E., Vol. XIV, p. 75; Mitakshara, I. 11, 13; Dattaka-Mimansa, II, 51; Dattaka Chandrika, II, 11).

The ritual is further elaborated by Baudhayana (VII, 5; S. B. E., Vol. XIV, pp. 334-336; Dattaka Mimansa, V, 42; Dattaka Chandrika, II, 16; Journal, A. S. B., Vol. XXXV, p. 162), though not in the passage where he classifies the various kinds of sons (II, 2, 3, 20; S. B. E., Vol. XIV, p. 227). An equally elaborate description is given by Saunaka. [Dattakamimansa (V, 2, 42); Dattaka Chandrika (II, 1, 3, 5, 7, 9); Vyavahara Mayukha (IV. 5, Paras. 8, 36-42); Mandlik, pp. 50-53, 63-65. Bühler, Journal A. S. B., Vol. XXXV, page 149]. These statements, nothing like which can be found either in Yajnavalkya (II, 130; Mandlik, p. 219) or in Vishnu (XV, 18-19; S. B. E., Vol VII, p. 63), still leave the question open, whether the performance of the *homa* is essential for the validity of the adoption, because they enumerate it along with other matters, such as the assembly of the kindred and notice to the king, which have never been deemed indispensable to validate the adoption. The Mitakshara and its commentaries, Subodhini and Balambhatti, though referring specifically to the text of Vasistha, do not raise the question at all [Mitakshara Ed., Setlur, p. 695]. A similar observation applies to Apararka, who, in his commentary on Yajnavalkya (II, 130), contents himself by quoting the verse of Manu (IX, 168). When, however, we come to the Dattaka Mimansa, we find definite rules laid down on the subject: para. 31 of section V

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lays down that the filial relation of the five sons previously mentioned proceeds from adoption, only with observance of the form of either Vasistha or Saunaka and not otherwise. This is emphasised in Sec. V, Para. 56 where the general conclusion is stated that the filial relation of adopted sons is occasioned only by the proper ceremonies, and that the filial relation even fails, should either gift, acceptance, a burnt sacrament and so forth, be wanting. [Reference may also be made to Sec. V] para. 47 where an ingenious attempt is made to read this interpretation into the simple text of Manu (IX, 168), and to Sec. V., para. 55 where a quotation from Medhatithi, which cannot be traced in his commentary on Manu, is similarly treated]. To the same effect is the statement in the Dattaka Chandrika, Sec. II, Para. 17, where it is recited, after the description in Para. 16 of the mode of adoption prescribed by Baudhayana for followers of the Taittiri Veda, that in case no form as propounded should be observed, the adopted son will be declared entitled to assets sufficient for his marriage. This is reiterated in Sec. VI, Para. 3, where reliance is placed on a text of Manu which has not been traced: "He who adopts a son without observing the rules ordained, should make him the participator of the rites of marriage, not a sharer of the wealth." In this connection, it is worthy of note that the opinion has been expressed by Sastri Golap Chandra Sarkar [Tagore Lectures on Adoption, p. 124; Hindu Law, 4th Edition, page 126], that the Dattaka Chandrika was composed about the year 1800 for the purposes of a particular litigation, by one Raghumani Vidyabhusana who passed it off as the work of Kuvera. Serious notice need not accordingly be taken of a text which has not been found in the Institutes of Manu. There remains, however, the opinion of the author of the Dattaka Mimansa, which is no doubt entitled to weight. As against his opinion, we have the contrary view maintained by commentators of repute. Sankarabhatta, in his work styled the Dharma Divata Nirnaya, in the chapter styled the "Solution of doubts in regard to adoption," which has been translated by Mandlik, [page 55, lines 39-42] says that by the operation of the rule Yatha Saktinyaya (the rule which enjoins the observance of a precept as far as possible), the *homa* (sacrifice) or the like, which

s a part of the ritual enjoined for adoption, may be disregarded, or, the rule properly applies with regard to the details of an njoined ritual. Laugakshibhaskara, as Mandlik points out Yajnavalkya, p. 509], goes into this question very elaborately nd comes to the conclusion that the *homa* (sacrifice) or any ther ceremonies beyond giving and taking are not essential for ny of the four classes. The Dattaka Darpana, as we have lready stated, declares the performance of the *homa* and other eremonies unnecessary where the person to be adopted is a near elation, on the strength of a liberal interpretation of the xpression brother's son in the text of Yama. The Dattaka Nirnaya (Dattaka Shiromoni, page 238) declares an adoption erformed without *homa* to be valid, at least in the case of udras. The Dattaka Kaumudi (Dattaka Siromani, page 245) notes the commentary of Maheswara and the Dayakala of habadeva as authorities in favour of the validity of an adop- on where the Dattahoma ceremony has not been performed. aganath, in his great Digest of Hindu Law, translated by olebrooke, after an elaborate examination of the texts, comes the conclusion that an adoption without the performance of attahoma is valid. (Volume III, page 323; Book V, Chap. V, Sec. VIII, para. 273). Jagannath observes that the gift nd acceptance only are essential, and that the *homa* or oblation the fire with holy words from the Veda is an unessential part the ceremony; even though it be defective, the adoption is nevertheless valid, for no one admits that the principal object is nattained if an unessential part be defective. Jagannath directs very weighty criticism against the position that the Dattahoma necessary; if you say that the performance of the *homa* is sential, then you cannot but admit that it must be accurately, operly and completely performed; for if there be any defect its performance, it cannot serve the purpose; but you say that even a defective *homa* is sufficient, you cessarily admit that it is not essential. There can be question as to the weight to be attached to an opinion pressed by Jagannath Tarkapanchanan, who, as stated by warkanath Mitter J. in *Kery Kolitany* v. *Monoranjan Kolita*,[1] as one of the most learned Pandits that Bengal had ever

[1] (1873) 13 B. L. R. 7 (44).

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produced and whose authority on questions of Hindu Law ranks only next to that of Jimutavahana, Raghunandana and Srikrishna. The divergence of opinion to which we have referred, has led to a similar want of unanimity amongst leading text writers of the last century. Thus, Shama Churn Sirkar strenuously maintained, to the end, the view that the Dattahoma is essential, not only in the case of the three regenerate classes, but also in the case of Sudras, and wrote a learned criticism on the contrary opinion established by a Full Bench of this Court [*Behari Lal* v. *Indramani*[1]], subsequently approved by their Lordships of the Judicial Committee, *Indramani* v. *Behari Lal*[2]; Vyavastha Darpana, 3rd Ed., Part I, p. 355; Part II, p. 574; Vyavastha Chandrika, Part II, p. 125]. Dr. Jogendranath Bhattacharyya acquiesced in the view that the Dattahoma is not necessary in the case of Sudras, but maintained that it is essential in the case of the three regenerate classes [Hindu Law, 3rd Ed., Vol. I, p. 450]. On the other hand, Sastri Golap Chandra Sarkar follows the view of Jagannath that the absence of the Dattahoma does not in any case affect the validity of an adoption [Tagore Lectures on Adoption, p. 377].

When we turn to examine the course of judicial decisions on the subject, we meet with a similar absence of uniformity. But one point is now finally settled, *viz.*, no religious ceremony is essential in the case of adoption by Sudras. This had been formulated by the Supreme Court of Calcutta as early as 1800 when Sir John Anstruther, C. J., with the concurrence of Royds and Russell JJ., held, in the case of *Gopee Mohun Deb* v. *Rajeeshna Deb*[3] that the adoption was validity made if gift and acceptance of the child by an overt act was shown to have taken place. The elaborate judgment of the Chief Justice is mentioned by Sir Thomas Strange is his Elements of Hindu Law, 1825, Vol. I, page 84, but has never been traced. There was, after this, a uniform succession of decisions to that effect: *Joymony* v. *Sibo Soondry*,[4] *Dayamayee* v. *Ruttihari*,[5] *Ramkishore* v. *Bhubanmayee*,[6] *Perkash Chandra* v. *Dhanmani*,[7] *Sreemutty* v.

[1] (1874) 13 B. L. R. 401; 21 W. R. 285.
[2] (1872) L. R. 7 I.A. 24, I. L. R. 5 Calc. 770.
[3] (1800) Montriou Hindu Law Cases, 381.
[4] (1837) Fulton 75.
[5] (1852) Beng. S. D. A. 1001.
[6] (1859) Beng. S. D. A. 229.
[7] (1853) Beng. S. D. A. 96.

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...ables.[1] The flow of this current was, however, interrupted by the contrary view taken in *Ramnath Nath* v. *Mahesh Chunder*[2] and *Jypanalal* v. *Sundaram*,[3] which were doubted and disapproved in *Nittanund* v. *Krishna Dyal*[4] and were ultimately overruled by the Full Bench in *Behari Lal* v. *Indromoni*,[5] the decision wherein was confirmed on appeal to the Judicial Committee, *Indromoni* v. *Beharilal*.[6] This brought the rule on this point into harmony with what had been laid down in *Sotrugun* v. *Sabitra*[7] (on appeal from *Sabitree* v. *Sutur Gunj*[8], *Veeraperumal* v. *Narain*,[9] from *Alwar* v. *Ramaswamy*[10]) and *Singalkhani* v. *Rama Mudali*.[11] The principle that religious ceremonies are not necessary in the case of an adoption by a Sudra has been applied to support the inference that a Sudra leper can adopt, *Sukumari* v. *Ananta*[12]; see also *Sitanath* v. *Krishna Sundari*.[13] As regards the three regenerate classes, however, the point is by no means settled. The dictum of Lord Wynford in *Sotrugun* v. *Sabitra*[7] undoubtedly admits of a wide interpretation, and in Madras it was actually decided in *Singamma* v. *Venkatacharlu*,[14] on the strength of the opinion of Jagannath and the decision of Sir Thomas Strange in *Veeraperumal* v. *Narain*,[9] that even in the case of Brahmans, the gift and acceptance of a boy qualified to be adopted is sufficient to constitute a valid adoption according to Hindu Law. A similar view was adopted in the case of a Kshatriya in *Chandramala* v. *Muktamala*,[15] and of a Numbudri Brahman in *Shankaran* v. *Kesavan*.[16] But the tide has apparently turned back in Madras, and the view taken in *Singamma* v. *Venkatacharlu*[14] has been doubted in *Venkata* v. *Subhadra*[17] and *Subbarayar* v. *Subbammal*,[18] though it has been held in the second of these cases that the Dattahoma, which had not been performed by the adoptive father, could, after his death, be performed by his widow. The latter

[1] (1869) 11 W. R. 192. On appeal (1872) L. R. I. A. Sup. Vol. 149.
[2] (1870) 4 B. L. R. 162.
[3] (1870) 5 B. L. R. 362.
[4] (1871) 7 B. L. R. 1; 15 W. R. 300.
[5] (1874) 13 B. L. R. 401; 21 W. R. 285.
[6] (1879) L. R. 7 I. A. 24; I. L. R. 5 Calc. 770.
[7] (1834) 2 Knapp. 287 (293).
[8] (1812) 2 Mac. Sel. Rep. 21.
[9] (1801) 1 Strange. N. C. 78 (91).
[10] (1858) 2 Mad. S. D. 67.
[11] (1882) I. L. R. 5 Mad. 358.
[12] (1900) I. L. R. 28 Calc. 168.
[13] (1880) L. R. 7 I. A. 250; I. L. R. 6 Calc. 381.
[14] (1868) 4 Mad. H. C. R. 165.
[15] (1882) I. L. R. 6 Mad. 20.
[16] (1891) I. L. R. 15 Mad. 7.
[17] (1884) I. L. R. 7 Mad. 548.
[18] (1898) I. L. R. 21 Mad. 497.

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view in Madras, as indicated in *Govindayar* v. *Dorasami*[1] and *Ranganaya Kamma* v. *Alwar*,[2] is sought to be supported by reliance on the dictum of the Judicial Committee in *Mahasaya Sasinath* v. *Srimati Krishna*[3] to the effect that "amongst the twice born classes, there can be no valid adoption by deed, and certain religious ceremonies, the Dattahoma in particular, are in their case requisite." A similar view is embodied in the extract from Savara Swami translated by Ellis (Strange's Hindu Law, 1825, Vol. II, p. 192) and had also been put forward by the Pandits who were consulted in the cases of *Alank Manjari* v. *Fakir Chand*[4] and *Bullubakant* v. *Kishenprea*.[5] The statement by Dwarkanath Mitter, J. in *Luchmun* v. *Mohun*,[6] to which reference has already been made, points in the same direction, and *Thakoor Oomrao* v. *Thakooranee*[7] leads to the same conclusion, though it recognizes that the ceremony may be performed at any place. There are also expressions in *Ravji* v. *Lashmibai*[8] which may possibly be called in aid by those who seek to support the more stringent rule. In this diversity of judicial opinion, it must be conceded that the principle that Dattahoma ceremony is essential for the validity of an adoption among Brahmans, still counts a strong body of supporters, and that the rationalistic view has not yet finally triumphed over formalism. Yet among all this divergence of opinion, the doctrine clearly emerges that the Dattahoma is not necessary when the adoptive father and the adopted child belong to the same Gotra. *Govindayyar* v. *Dorasami*,[1] *Ranganaya Kamma* v. *Alwar*,[2] *Thangahammi* v. *Ramu*,[9] *Vedavalli* v. *Mangamma*,[10] *Valubai* v. *Govind*,[11] *Atmaram* v. *Madho* [illegible],[12] *Nittyanund* v. *Kishen Dayal*.[13] It has, indeed, been argued that this distinction is not based on logical grounds, and that the view cannot be maintained that Dattahoma becomes unnecessary where the adoptive father and the adopted child belong to the same Gotra because a change of Gotra is not

[1] (1887) I. L. R. 11 Mad. 5.
[2] (1889) I. L. R. 13 Mad. 214.
[3] (1880) L. R. 7 I. A. 250 (256).
[4] (1834) 5 Mac. Sel. Rep. 356 (418 N. E.)
[5] (1838) 6 Mac. Sel. Rep. 219 (270 N. E.)
[6] (1871) 16 W. R. 179.
[7] (1868) 3 Agra H. C. R. 103.
[8] (1887) I. L. R. 11 Bom. 381 (393).
[9] (1882) I. L. R. 5 Mad. 358.
[10] (1903) I. L. R. 27 Mad. 538; 14 M. L. J. 340.
[11] (1899) I. L. R. 24 Bom. 218.
[12] (1884) I. L. R. 6 All. 276.
[13] (1871) 15 W. R. 300.

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necessary in such a case. It is not necessary for our present purpose to examine, whether what is thus regarded as an exception is based on logical grounds, or, as is not improbable, really indicates a modern relaxation of the primitive inflexible rule, in the growth of which, as in so many archaic systems, formalism exercised a dominating influence. Whether the rule itself will ultimately stand discredited and disappear, it is needless to speculate in this instance; it is sufficient to hold that the present case falls within the text of Yama and is covered by a long series of decisions which affirm the doctrine that even amongst twice-born classes, the Dattahoma is not essential when the adopted boy is of the same Gotra as his adopter.

In this view, the validity of the adoption of the plaintiff must be upheld, the decree of the Subordinate Judge affirmed and this appeal dismissed with costs.

Appeal dismissed.

NOTE.—There should be a giving and a taking to constitute a valid adoption. *Sreenath* v. *Kishori Soondari*, L. R. 7 I. A. 250; I. L. R. 6 Calc. 381. See also *Nil Madhab* v. *Bishumber*, 13 M. I. A. 85 at p. 101 where their lordships say, "It is admitted on all hands that it is only by reason of the gift that the filial relation to the natural father is extinguished." But such a giving and taking as is necessary to constitute a valid adoption cannot be effected by mere execution of deeds without more. 11 B. L. R. 174; I. A. Sup. vol. 140; 7 I. A. 250; 2 C. W. N. 154 (156). And deeds are in no way necessary to render the adoption valid.

Gift and acceptance are secular acts. The question arose whether religious ceremonies are necessary for valid adoption; or, in other words, whether *Datta homa* is necessary? It is now settled that it is unnecessary if the adopted boy belongs to the same gotra or in the case of adoption among Sudras. See also *Bal Gangadhar Tilak* v. *Shri Shrinivas*, 22 C. L. J. 1 P. C.; I. L. R. 39 Bom. 441 P. C. The question whether it is necessary among the three regenerate classes, is still unsettled.

Among Jains no religious ceremony is necessary. 8 All. 319 (321).

Dattahomam itself can be performed at any time after the giving and receiving the boy. I. L. R. 5 Calc. 770; L. R. 7 I. A. 21. In I. L. R. 7 Mad. 549, the ceremony was performed 5 years after the giving and after the natural father's death. The case in 21 Mad. 497 (See p. 502) shows that the ceremony was performed after the adoptive father's death. It is not necessary that the natural father should himself participate in the ceremony; I. L. R. 18 Mad. 397 (399); 5 M. L. J. 66. See also I. L. R. 22 Bom. 599 where the widow adopting delegated the duty of officiating in the religious ceremony to a relative.

The ceremony can be performed at any place. 3 Agra H. C. 103A.